79-1922

No. 79-

Supreme Court, U. S.
FILED
JUN 6 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,

v.

JAMES E. HENDLEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES A. HORSKY
DONNA L. KOHANSKY
888 - 16th Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

WILLIAM P. STALLSMITH, JR.
JOHN B. MILLER
EDGAR A. NEELY, JR.
ELLSWORTH HALL, JR.
P.O. Box 1808
Washington, D.C. 20013
Of Counsel

TABLE OF CONTENTS

	Page
Opinions Below	i
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	2
Reasons for Granting the Writ	6
Conclusion	15
Appendix A—Text of Statutes Involved	1a
Appendix B—Opinion of the Court of Appeals	4a
Appendix C—Judgment of the Court of Appeals	17a
Appendix D—Opinion of the District Court	18a
Appendix E—Judgment of the District Court	26a
Appendix F—Award of the Public Law Board	27a
Appendix G—Denial of Rehearing and Rehearing En Banc by the Court of Appeals	32a

CASES: Page

Andrews v. *Louisville & Nashville Railroad*, 406 U.S. 320 ..... 6, 7, 8, 10, 12, 15

Armour Packing Co. v. *United States*, 209 U.S. 56 8

Brotherhood of Locomotive Engineers v. *Louisville & Nashville Railroad*, 373 U.S. 33 ..... 9, 13

Brotherhood of Railroad Trainmen v. *Howard*, 343 U.S. 768 8

Brotherhood of Railroad Trainmen v. *Smith*, 251 F.2d 282 (6th Cir. 1958) 8

Choate v. *Louisville & Nashville Railroad*, —— F. Supp. ——, No. 79-4206 (S.D. Ill. March 21, 1980) 15

DiBlasi v. *Baker*, 404 F. Supp. 654 (D. Mass. 1975), *aff'd mem.*, 539 F.2d 702 (1st Cir. 1976) 4

Elgin, Joliet & Eastern Railway v. *Burley*, 325 U.S. 711 8

Farmer v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 ..... 6, 8, 9, 12, 14, 15

Gunther v. *San Diego & Arizona Eastern Railway*, 382 U.S. 257 9

Illinois Central Railroad v. *Brotherhood of Locomotive Firemen and Enginemen*, 332 F.2d 850 (7th Cir.), *cert. denied*, 279 U.S. 932 (1964) 8

Johnson v. *Virginia*, 373 U.S. 61 16

Magnuson v. *Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978) 11

Mason v. *City of Biloxi*, 385 U.S. 370 16

Missouri-Kansas-Texas Railroad v. *Brotherhood of Railroad Trainmen*, 342 F.2d 298 (5th Cir. 1965) ..8, 13

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 .. 10

Northern Indiana Public Service Commission v. *Porter County Chapter*, 423 U.S. 12 16

Order of Railroad Telegraphers v. *Railway Express Agency, Inc.*, 321 U.S. 342 9

Page

Order of Railway Conductors v. *Southern Railway*, 339 U.S. 255 14

Pennsylvania Railroad v. *Day*, 360 U.S. 548 .....13, 14

Railway Labor Executives Association v. *Atchison, Topeka & Santa Fe Railway*, 430 F.2d 994 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971) ...8, 9, 12

Singleton v. *Wulff*, 428 U.S. 106 10

Slocum v. *Delaware, Lackawana & Western Railroad*, 339 U.S. 239 .....13, 14

Switchmen's Union of North America v. *Southern Pacific Co.*, 398 F.2d 443 (9th Cir. 1968) 7

Union Pacific Railroad Co. v. *Sheehan*, 439 U.S. 89 9

United Steelworkers of America v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 7

United Transportation Union v. *Baker*, 482 F.2d 228 (6th Cir. 1973) 7

Von Hoffman v. *Quincy*, 71 U.S. (4 Wall.) 535 8

STATUTES:

Federal Employers' Liability Act
45 U.S.C. § 56 3
45 U.S.C. § 60 .....2, 3, 10, 14

Interstate Commerce Act, 49 U.S.C. § 13a 12, 13

Railway Labor Act, 45 U.S.C. § 153 ..... 2, 3
§ 153 First (i) 2, 14
§ 153 First (m) 2
§ 153 First (p) 9
§ 153 First (q) 2, 5, 9
§ 153 Second 2, 3, 4
(Pub. L. No. 89-456, 80 Stat. 208) 4

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 3

MISCELLANEOUS: Page

Agreement Between Central of Georgia Railroad and Its Switchmen Represented by United Transportation Union 8

Garrison, "The National Railroad Adjustment Board: A Unique Administrative Agency," 46 *Yale L. Rev.* 567 (1937) 10

Hearings on S. 1708 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 1st Sess. (1939) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,

v.

JAMES E. HENDLEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Central of Georgia Railroad Company, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Georgia is reported at 442 F. Supp. 482, and is reproduced in Appendix D at pages 18a-25a. The opinion of the Court of Appeals is reported at 609 F.2d 1146, and is reprinted in Appendix B at pages 4a-16a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1980 (App. C, p. 17a). The time to file an application for rehearing was extended, and a timely petition for rehearing *en banc* was denied on March 12, 1980 (App. G, p. 32a). Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

May an employee avoid mandatory arbitration under the Railway Labor Act, 45 U.S.C. § 153, of his wrongful discharge grievance by filing a suit to enjoin the railroad's disciplinary investigation that resulted in his discharge, alleging violation of 45 U.S.C. § 60, a criminal statute adjunct to the Federal Employers' Liability Act?

STATUTES INVOLVED

The Railway Labor Act, 45 U.S.C. § 153 First (i), (m) and (q), and Section 153 Second; and the Federal Employers' Liability Act, 45 U.S.C. § 60. Their pertinent text is set forth in Appendix A at pages 1a-3a.

STATEMENT

This action began as an effort by respondent Hendley to enjoin petitioner Central of Georgia Railroad Company from conducting a disciplinary investigation pursuant to the applicable collective bargaining agreement as to whether Hendley, one of Central's employees, had been guilty of disloyalty. Under investigation was Hendley's accompanying and assisting an attorney for the plaintiff in an unrelated and terminated

FELA action in surreptitiously entering private property without authorization to photograph the scene of the accident involved in the FELA case. The injunction was sought on the ground that the investigation would violate 45 U.S.C. § 60, a criminal statute forbidding any action which would prevent any person from voluntarily providing information as to the facts incident to any injury of an employee.[1] Hendley also alleged that the investigation would violate Georgia Code § 79-205, which, *inter alia,* guarantees due process, but he did not pursue this ground. Hendley asserted 28 U.S.C. § 1331, 45 U.S.C. § 60, and 45 U.S.C. § 56 as bases of jurisdiction. The District Court denied relief. (App. D, pp. 18a-25a.) Noting the applicability of the grievance machinery of the collective agreement and the Railway Labor Act to this dispute (*ibid.,* pp. 20a-21a), the District Court observed that Hendley's purpose in seeking an injunction was "not to obtain relief under 45 U.S.C. § 60," but rather "to by-pass the mandatory remedies prescribed by Congress" (*ibid.*, p. 23a). The District Court accordingly held that Hendley's grievance against Central was a "minor dispute" subject to the exclusive jurisdiction of the National Railroad Adjustment Board under the Railway Labor Act, 45 U.S.C. § 153. (*Ibid.,* pp. 24a-25a.) The District Court further held that Hendley "[c]learly . . . has an adequate administrative remedy under the law" because "[t]he dispute involved in this case is part of the ordinary, diurnal grist of employee-employer relations;" "[t]he questions involved in the disciplinary investigation include whether or not the conduct complained of constituted disloyalty;" and "[s]uch questions of fact (or law)

[1] The full text of Section 60 is set out in Appendix A at page 3a.

are determinable under established grievance and arbitral procedures, contractual and statutory." (*Ibid.*, pp. 23a-24a.)

Following the District Court's decision and subsequent denials of Hendley's requests for an injunction pending appeal, Central's internal investigation proceeded. Central's charge was based on descriptions of Hendley's conduct made during his deposition in the discontinued FELA proceeding.[2] At the investigation hearing some conflicting testimony was presented. On the whole record, Central concluded that the weight of the evidence showed that Hendley had been disloyal, and that dismissal was the appropriate sanction.

Hendley obtained review of the railroad's decision by a Public Law Board as provided by the Railway Labor Act, 45 U.S.C. § 153 Second.[3] That Board up-

---

[2] Hendley was not called as a witness in the FELA case, but the photographs that he helped to procure were admitted in evidence in that case. (App. D, p. 18a, n.1.)

[3] The pertinent text of 45 U.S.C. § 153 Second is reproduced in Appendix A, at pages 2a-3a. Public Law Boards were created in a 1966 amendment to the Railway Labor Act, Pub. L. No. 89-456, 80 Stat. 208, to relieve the congestion in the docket of the National Railroad Adjustment Board. The two boards are identical in jurisdiction, since Public Law Boards are empowered "to resolve disputes otherwise referable to the Adjustment Board." 45 U.S.C. § 153 Second. And the scope of judicial review of Public Law Board decisions is the same as the scope of review of the decisions of the National Railroad Adjustment Board. 45 U.S.C. § 153 Second; *see* DiBlasi v. Baker, 404 F. Supp. 654, 655 (D. Mass. 1975), *aff'd mem.*, 539 F.2d 702 (1st Cir. 1976). The Public Law Board that handled Hendley's grievance (Public Law Board No. 2086) was properly established pursuant to 45 U.S.C. § 153 Second by agreement between United Transportation Union and Central of Georgia Railroad Company. All references herein to the powers and attributes of Adjustment Boards therefore apply equally to the Public Law Board whose decision is involved in this case.

held Central's determination that Hendley had been disloyal. (App. F, pp. 29a-30a.) It disagreed with Central, however, on the appropriate sanction. While agreeing that Hendley's offense warranted disciplinary action, it found dismissal too harsh a penalty, and ordered Hendley reinstated but without back pay. (*Ibid.*, p. 30a.) Neither Hendley nor Central petitioned for judicial review of the Board's action as provided by the Act, 45 U.S.C. § 153 First (q). Hendley was promptly reinstated and has continued to be an employee of Central.

Meanwhile, Hendley had appealed from the District Court's denial of injunctive relief. While the case was pending in the Court of Appeals, Hendley, over Central's objections, lodged with that court a transcript of Central's internal investigation. When the Public Law Board's decision was made, Central lodged a copy of that with the court below.

On that record, and not, it should be emphasized, in a proceeding to review the decision of the Public Law Board as provided in 45 U.S.C. § 153 First (q), the court below declared the award of the Board "null and void." (App. B, p. 16a.) The court found "coercive" the fact that the Railway Labor Act requires an employee "to submit to the hearing and to process his claim through arbitration before finally reaching the federal courts" (*ibid.*, p. 14a), and held that Hendley's claim that the contractually and statutorily prescribed investigation and arbitration procedures were instituted for retaliatory purposes in violation of Section 60 may be determined by the federal courts outside the procedures of the Railway Labor Act (*ibid.*, pp. 15a-16a). It then made its own evaluation of the conflicting evidence contained in the investigation

transcript which had been before the Public Law Board, disagreed with the Board's finding that Hendley's conduct had constituted disloyalty, and ordered that Hendley receive full back pay. (*Id.*)

A timely petition for rehearing *en banc* was denied. (App. G, p. 32a.)

REASONS FOR GRANTING THE WRIT

I.

The decision below conflicts with the principles established by this Court in *Andrews* v. *Louisville & Nashville Railroad,* 406 U.S. 320, and *Farmer* v. *United Brotherhood of Carpenters & Joiners,* 430 U.S. 290. In *Andrews,* the Court made clear that the National Railroad Adjustment Board's jurisdiction over wrongful discharge disputes may not be circumvented through a court action brought by an employee claiming to assert no rights under the collective bargaining agreement but, rather, under the general law of contracts. The Court expressly rejected the notion that the employee's characterization of the nature of his complaint could operate to avoid jurisdiction under the Railway Labor Act. 406 U.S. at 323-24. Subsequently, in *Farmer,* the Court stressed that a suit under state law for intentional infliction of emotional distress, based on a series of incidents that could form the basis of an unfair labor charge before the National Labor Relations Board, may be maintained only if and to the extent that there is no realistic threat of interference with the federal regulatory scheme, that is, only if there is no overlap in enforcement of two discrete areas of government concern. 430 U.S. at 304-307. The lesson of *Andrews* and *Farmer* is that a court

must look beyond the form of an action to the substance of the claim in order to ensure that providing a judicial forum for resolution does not interfere with the remedies provided by the federal regulatory scheme.[4]

This is precisely what was done by the District Court in the present case. (App. D, p. 23a.) It is also precisely what was ignored by the court below. Notwithstanding the language of Hendley's complaint, his grievance, as the District Court recognized, was in substance that he would be wrongfully discharged unless the railroad was enjoined.[5] Ignoring the holding of *Andrews* that a wrongful discharge claim is within the exclusive province of the Board, the court below accepted Hendley's characterization of his claim. It then adopted the simple expedient of stating that since resolution of Hendley's claim involves interpre-

---

[4] Substance over form has long been the rule in cases dealing with the "major"-versus-"minor" dispute dichotomy under the Railway Labor Act. Switchmen's Union of North America v. Southern Pacific Co., 398 F.2d 443, 447 (9th Cir. 1968). Thus, regardless of how parties characterize their dispute, it will be held to be a "minor dispute" within the exclusive province of the Adjustment Board if the disputed action by one of the parties can "arguably" be justified in the agreement or if the contention that the contract sanctions the disputed action is not "obviously insubstantial." *E.g.*, United Transportation Union v. Baker, 482 F.2d 228 (6th Cir. 1973).

Like *Andrews*, 406 U.S. at 323, these decisions reflect the preference for arbitration which is embodied in our federal labor-management relations laws and which requires courts to resolve doubts in favor of arbitration, *see* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, 582-83—a prudent policy to which the decision below fails to adhere.

[5] This plainly appears from the face of Hendley's complaint itself, in which he requests relief from petitioner's "interfering with Plaintiff's employment." (Complaint, ¶ 9.)

tation of a federal statute, Section 60, it "is therefore a matter of federal jurisdiction" and the disputes resolution system of the Railway Labor Act may be ignored. (App. B, p. 11a.)[6] However, as *Andrews* and *Farmer* make clear, remaining faithful to the Congressional purposes in establishing the compulsory arbitration procedures of the Railway Labor Act requires a more searching scrutiny. Article 21 of the applicable collective bargaining agreement[7] confers on Hendley the right not to be disciplined unjustly or "without just cause." If Hendley's investigation and discharge by the railroad violate Section 60, they also violate the collective agreement. This is especially true since subsisting laws must enter into and form part of a contract. *Von Hoffman* v. *Quincy*, 71 U.S. (4 Wall.) 535, 550; *e.g.*, *Armour Packing Co.* v. *United States*, 209 U.S. 56, 82 (a federal criminal statute).[8] And contrary to the suggestion of the court below,

---

[6] What is involved here is the proper application and interpretation of a labor agreement, 45 U.S.C. § 153 First (i) (App. A, p. 1a), not the validity of a labor agreement, a confusion suggested by the erroneous reliance by the court below (App. B, p. 11a) on decisions in which the validity of agreements was challenged (Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 68; Brotherhood of Railroad Trainmen v. Smith, 251 F.2d 282 (6th Cir. 1958)).

[7] Agreement between Central of Georgia Railroad Company and its Switchmen Represented by United Transportation Union (effective December 1, 1977).

[8] The Adjustment Board is fully empowered to resolve grievances involving terms not expressly included in a collective agreement. Elgin, Joliet & Eastern Railway v. Burley, 325 U.S. 711, 723; Railway Labor Executives Association v. Atchison, Topeka & Santa Fe Railway, 430 F.2d 994, 996 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); Missouri-Kansas-Texas Railroad v. Brotherhood of Railroad Trainmen, 342 F.2d 298, 300 (5th Cir. 1965); Illinois Central Railroad v. Brotherhood of Locomotive Firemen and Enginemen, 332 F.2d 850, 853 (7th Cir.), *cert. denied*, 379 U.S. 932 (1964).

the Board is competent to construe the agreement by interpreting and applying the applicable federal law. *E.g., Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342; *Railway Labor Executives Association* v. *Atchison, Topeka & Santa Fe Railway*, 430 F.2d 994, 997 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971).[9]

Indeed, the opinion of the court below itself belies any attempt to treat Hendley's Section 60 claim as collateral to the Act's grievance machinery. The factual basis of Hendley's Section 60 claim is precisely the same as that of the grievance he processed before the Board. But despite the warnings of this Court in *Farmer*, the court below adjudicated these facts, reaching a conclusion opposite to that reached by the Board. (App. B, pp. 15a-16a; *see also ibid.*, p. 8a, n.3.) Furthermore, the Court of Appeals ordered that Hendley receive back pay for the time he was unemployed until the Board ordered his reinstatement (*id.*), the very relief the Board is empowered to provide and declined to provide in this case.[10]

---

[9] Judicial review of the Board's decision is available under 45 U.S.C. § 153 First (p) or (q). *See* Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89, 93 (judicial review of Adjustment Board orders is confined to the three specific grounds stated in the Act); Gunther v. San Diego & Arizona Eastern Railway, 382 U.S. 257, 261 (Board interpretation of contract may be set aside if wholly baseless and completely without reason); Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. at 347 (Board's interpretation may be set aside if not in accordance with the law).

[10] The decision below is particularly egregious. (1) The court ignored the statutory procedure for review of Adjustment Board decisions, 45 U.S.C. § 153 First (p) and (q), even though this procedure is vital to the integrity of the grievance machinery of the Act. Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad, 373 U.S. 33, 38. (2) Although there had been no evidentiary hearing by the trial court, the court below adjudi-

Disregard for the decisions of this Court cannot be justified on the basis of the unsupported and unsupportable conclusion of the court below that Section 60 overrides the statutory arbitration process mandated by the Railway Labor Act. (App. B, p. 9a.)[11] There is no indication whatever either in the terms of Section 60 or in its history that Congress intended to override the single forum requirements of the Railway Labor Act established only five years before and hailed as a great advancement in effective railway labor disputes resolution.[12] Section 60, a criminal statute, does not even expressly authorize a cause of action for its civil enforcement. The conclusion that Congress expected that grievances raising Section 60 claims would be processed by the Adjustment Board is reinforced by the fact that, in enacting Section 60, Congress was aware that the Board routinely handled grievances

---

cated the conflicting facts contained in the transcript of the railroad's internal investigation, depriving petitioner of an opportunity to present evidence and to address legal arguments to the court. Singleton v. Wulff, 428 U.S. 106, 120.

[11] The sole reason offered by the court below for its conclusion that Section 60 overrides the Railway Labor Act's mandate of compulsory arbitration was that the Railway Labor Act requires Hendley to submit to the railroad's investigation and to process his claim to the Board before reaching the federal courts. (App. B, p. 10a.) Indeed, the court found this requirement "coercive." (*Ibid.*, p. 14a.) This, of course, flies in the face of both the Act itself and this Court's specific approval of the exhaustion requirement in *Andrews*. 406 U.S. at 325. In any event, "the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51.

[12] *See generally* Garrison, "The National Railroad Adjustment Board: A Unique Administrative Agency," 46 *Yale L. Rev.* 567 (1937).

brought by employees discharged for giving information in violation of railroad rules such as those prohibited by Section 60 and that the Board had condemned such discharges as wrongful and illegal.[13] Indeed, the extended discussion of the Board's decisions during Senate hearings indicates that they formed the backdrop for the protections embodied in the statute.[14] Had Congress intended that courts assume the Board's function in these disputes, it surely would have made its intention plain.

II.

The decision below also is irreconcilable with two decisions of another Court of Appeals in which, as here, employees sought to avoid Adjustment Board jurisdiction by characterizing the rights they asserted as arising under state or federal law but where, also as here, in substance the rights asserted involved governing provisions of collective bargaining agreements.

In *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978), a railroad employee was discharged following a company investigation of his conduct in connection with a train accident. The employee brought an action in state court, alleging that the railroad had abused the investigatory process. He attempted to justify resort to the state court by variously characterizing his claim as a tort suit for intentional infliction of emotional

---

[13] Hearings on S. 1708 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 1st Sess. 23, 39, 40-41, 42-44, 84 (1939) (statements of T. J. M'Grath, Brotherhood of Railroad Trainmen, and F. M. Rivinus, Norfolk & Western Railroad Co.).

[14] *Id.*

distress, as one for violation of his due process rights, and as an action for fraud. In a well-reasoned opinion discussing *Andrews* and *Farmer,* the Ninth Circuit rejected these characterizations for what they were—an effort to avoid the Railway Labor Act's disputes resolution machinery—and concluded that "[a]rtful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge." 576 F.2d at 1369. Since all of the alleged wrongful conduct of which the plaintiff complained was at least arguably governed by the collective agreement, which provided that he could not be disciplined "without proper investigation," there was complete overlap between judicial redress of the rights asserted and the grievance machinery of the Railway Labor Act. *Id.* at 1369-70. Accordingly, the plaintiff's exclusive remedy was under the Act. *Id.*

An earlier case in the same circuit is to the same effect. In *Railway Labor Executives Association* v. *Atchison, Topeka & Santa Fe Railway,* 430 F.2d 994 (9th Cir. 1970), *cert. denied,* 400 U.S. 1021 (1971), railroad employees sought damages for loss of work resulting from train discontinuances by the railroad, which they alleged violated the Interstate Commerce Act, 49 U.S.C. § 13a (1964). The court looked to the substance of the claim and found exclusive jurisdiction in the Board to resolve what was essentially an attempt to assert a right incident to the employment relationship:

> "The employees seek to characterize this action as a 'tort action' for violation of a statutory duty and, therefore, not referrable to the Adjustment Board. But the provisions of the Railway Labor Act relate to matters of substance, not form. [Cita-

> tion omitted.] Where, as here the dispute grows out of the employment relationship and, in the final analysis, involves an attempt to impose a right which is incident to that relationship, the statutory forum is the Adjustment Board, absent a clear expression of legislative policy to the contrary." *Id.* at 997.

The interpretation of Section 13a of the Interstate Commerce Act by the Board was found to be entirely appropriate,[15] especially since the Board's expertise in railroad practices and its duty to consider the effect of its ruling on future bargaining in the industry would be called into play to resolve the disagreement. *Id.*[16]

III.

The integrity of the Railway Labor Act's disputes resolution machinery when challenged by resort to other forums is important to the effective operation of the Act, as this Court has often recognized. *E.g., Brotherhood of Locomotive Engineers* v. *Louisville & Nashville Railroad,* 373 U.S. 33, 38; *Pennsylvania Railroad* v. *Day,* 360 U.S. 548, 552-53; *Slocum* v.

---

[15] Although there was no express provision in the collective agreement governing the employees' claim, the court noted that the language of the Interstate Commerce Act could have been incorporated into the agreement or bargained out in negotiation. 430 F.2d at 996.

[16] In a similar case involving an attempt by employees to enforce a railroad's common law duty to furnish a safe work place, a duty which was not expressly included in the applicable collective agreement, the Fifth Circuit itself held that the Railway Labor Act required the Adjustment Board to settle the grievance. Missouri-Kansas-Texas Railroad v. Brotherhood of Railroad Trainmen, 342 F.2d 298, 300 (5th Cir. 1965).

Delaware, Lackawanna & Western Railroad, 339 U.S. 239, 243-44. In the instant case, the dual processing of Hendley's grievance by both the Board and the court below and the clash between the results reached in the two forums are a paradigm of the dangers that this Court has recognized will defeat the central purpose behind the Act's providing for compulsory arbitration in a single forum specially competent in understanding the practices among railroad employees and employers.[17] *Pennsylvania Railroad* v. *Day,* 360 U.S. 548, 552-53. Other dangers, "races of diligence" to the preferred forum and deprivation of the other party's privilege under 45 U.S.C. § 153 First (i) of referring the dispute to the Board, were pointed out by the Court in *Order of Railway Conductors* v. *Southern Railway,* 339 U.S. 255, 256-57, a case in which, as here, a court had proceeded to adjudicate the very same dispute that was before the Adjustment Board.

If allowed to stand, the decision below will be a dangerous precedent under which employees asserting claims incident to the employment relationship may nevertheless bypass the competent jurisdiction of the Board simply by alleging a violation of some right under state or federal law.[18] The only limit on the

---

[17] The Board's experience would be of great assistance here in determining, for example, whether in a labor context in which "robust language and clash of strong personalities . . . may be commonplace," Farmer v. United Brotherhood of Carpenters & Joiners, 430 U.S. at 306, a disciplinary investigation has the "intimidating effect" perceived by the court below (App. B, p. 13a).

[18] Even though the court below stated that there are situations in which an employee may be disciplined without violating Section 60, in exercising "jurisdiction to determine whether a disciplinary hearing is brought for purposes violative of § 60" (App. B, p. 15a), a court necessarily must determine the merits of the question whether Section 60 is violated.

variety of ways in which employees may attempt to characterize such claims is their ingenuity. A graphic illustration is the damage action recently instituted by Hendley against petitioner and others in federal district court in Georgia,[19] for, *inter alia,* wrongful deprivation of his employment, mental anguish, deprivation of his rights of free speech and association, defamation, and libel—all of which he claims resulted from the very investigation and discharge at issue in this case.[20]

CONCLUSION

The decision below is incorrect, and dangerously so. As the decisions cited above indicate, there are continuing efforts to evade, by artful pleading in federal and state courts, the comprehensive and compulsory arbitration procedures of the Railway Labor Act. While the results of proceedings under the Act may often prove disappointing to railroads as well as their employees, proper channels of judicial review are

---

[19] Hendley v. Southern Railway Company, *et al.*, No. CV 479-351 (S.D. Ga.; complaint filed November 26, 1979). Hendley previously had filed the identical action in state court, but withdrew his complaint after filing the federal lawsuit. Hendley v. Southern Railway Company, *et al.*, No. 15096C (Chatham Co., Georgia, Superior Ct.; complaint filed November 16, 1979).

[20] Another example is Choate v. Louisville & Nashville Railroad, —— F. Supp. ——, No. 79-4206 (S.D. Ill. March 21, 1980), in which an employee sought to bypass the judicial review procedures of the Railway Labor Act, 45 U.S.C. § 153 First (p), by filing a suit for damages for the railroad's alleged refusal to comply with a Public Law Board award, which he claimed caused him substantial emotional distress. Relying on *Andrews* and *Farmer,* the District Court refused to entertain his action, noting that "[i]f this Court allowed every plaintiff who was wrongfully discharged to couch his complaint in such terms, it would clearly be in derogation of the purposes of the R.L.A." *Slip op.* at 3.

available, and the Adjustment Boards have disposed of countless thousands of minor disputes which otherwise would have burdened court dockets and been the potential source of industrial strife. It is of more than ordinary importance that there can be no encouragement to those who would nullify a wise Congressional policy favoring arbitration. Unless reversed, the decision below may have just that effect.

Indeed, because the Court may conclude that the court below committed clear error in injecting itself into a matter which had already been resolved by the Adjustment Board, the appropriate relief may be a summary reversal with instructions to dismiss the complaint. *Cf. Northern Indiana Public Service Commission* v. *Porter County Chapter,* 423 U.S. 12; *Mason* v. *City of Biloxi,* 385 U.S. 370; *Johnson* v. *Virginia,* 373 U.S. 61. Or, the court may conclude that the case should be set for briefs and argument.

Respectfully submitted,

CHARLES A. HORSKY
DONNA L. KOHANSKY
888 - 16th Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner

WILLIAM P. STALLSMITH, JR.
JOHN B. MILLER
EDGAR A. NEELY, JR.
ELLSWORTH HALL, JR.
P.O. Box 1808
Washington, D.C. 20013

Of Counsel

June, 1980

APPENDIX

APPENDIX A

Text of Statutes Involved

The Railroad Labor Act, 45 U.S.C. § 153 First, provides in relevant part:

> (i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.
>
> * * *
>
> (m) The awards of the several divisions of the Adjustment Board . . . shall be final and binding upon both parties to the dispute.
>
> * * *
>
> (q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it

based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28.

The Railway Labor Act, 45 U.S.C. § 153 Second, provides in relevant part:

* * *

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made.

* * *

> . . . awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

The Federal Employers' Liability Act, 45 U.S.C. § 60, provides:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be constructed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-1058

JAMES E. HENDLEY,
Plaintiff-Appellant,

v.

CENTRAL OF GEORGIA RAILROAD CO.,
Defendant-Appellee.

January 15, 1980

Appeal from the United States District Court for the Southern District of Georgia.

Before TUTTLE, VANCE and KRAVITCH, Circuit Judges.

TUTTLE, Circuit Judge:

The appellant, a railroad employee, was charged with disloyalty to the railroad because of his assistance in a fellow employee's FELA action against the railroad. He filed an action to enjoin the railroad from conducting a disciplinary hearing, and now appeals from the district court's denial of the injunction. We reverse and remand.

James E. Hendley is employed by Central of Georgia Railroad as a switch engine foreman, and serves as local chairman of the United Transportation Union. In 1977, Daniel Razook, also a Central of Georgia employee, filed suit under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, against Central of Georgia and Union Camp Corporation, a customer of the railroad. Razook had been injured while working on a Central of Georgia railroad track which runs through the property of Union Camp Corporation. Although the property on which the tracks are located is owned by Union Camp, Central of Georgia

and the Seaboard Coast Line Railroad have operating rights to the tracks.

Hendley had not been present when Razook was injured; however, he had been employed by the railroad for twenty-five years and was very familiar with the Union Camp yard. Razook, who was confused about the exact physical layout of the tracks, called Hendley at home and asked Hendley to meet him at the Union Camp Company to look at the tracks. Hendley, who was not on duty that day, arrived first, and was met on the property by Razook and Billy Moore, Razook's attorney. Razook had not mentioned to Hendley that he would be accompanied by his attorney. The three men walked through a gate to the area where the tracks were located. While Razook and Hendley were discussing the tracks, Moore took some pictures of the yard. Hendley did not assist Moore in taking the pictures. An engine was stopped in the woodyard, and Hendley and Moore apparently stepped up on it to speak to the railroad workers. None of the parties can recall whether the engine belonged to Seaboard or Central of Georgia.

On November 11, 1977, Hendley was deposed in connection with the Razook case. He answered questions concerning the physical characteristics of the Union Camp yard and discussed his visit to Union Camp to view the tracks with Razook. Certain responses in the deposition indicated that Hendley and Moore had climbed up onto a switch engine.[1]

---

[1] The deposition also included the following exchange between John Miller, the attorney for Central of Georgia, and Hendley:

Q. You said you came in on a road there. Did you come into Union Camp's premises on the switch engine, or did you——

A. No. We drove in on the premises.

Q. How did you get through the gate?

A. When you say "premises," I don't know if you mean the yard or the particular track. We drove in off Bay Street

A few days after Hendley's deposition was taken, W. D. Cogdell, Hendley's superintendent, saw the deposition while helping to prepare the defense in Razook's case. After reviewing the deposition, he concluded that Hendley was guilty of disloyalty to the railroad. The trial of Razook's case against the railroad ended on November 30, and on the next day, December 1, Hendley received a letter from Cogdell informing him of a formal investigation to be held on December 2 at 11:00 A.M. The letter charged Hendley with "disloyalty to the Central of Georgia Railroad Company in that you accompanied and assisted Mr. Billy Moore onto the property of the Union Camp Corporation

---

to the yard and walked down the yard where there was a switch engine on Track 16.

Q. That's the same way you come in when you go to work out there?

A. Yeah.

Q. Do you have a sticker on your car, with identification?

A. No, sir.

Q. How do you get through the gate?

A. Well, there's no gate actually. When I say "gate," I thought ya'll were referring to the gate that comes into these two particular tracks.

There's two roads that lead—no road for an automobile. It's just a gate for the track.

Q. Well, when you drove the switch engine in there, was that part of the job you were doing, or did you take it in there just to take pictures?

A. No, there was a switch engine, if I'm not mistaken, that was going that way, because I don't know these people, really. I can't really remember.

From reading this language, Hendley's superintendent concluded that Hendley and Moore had stopped an engine and ridden into the yard. At the disciplinary hearing, it developed that they did not actually ride into the woodyard on a locomotive engine. They merely stepped onto an engine briefly to speak to other employees.

on an unknown date for the purpose of making photographs of Union Camp Corporation's property for use in a law suit against the Central of Georgia Railroad Company and Union Camp which is in violation of rule R [2] of the book of operating rules of Southern Railway System." Hendley was suspended from service as of December 1, pending the outcome of the investigation. At Hendley's request, the investigation was postponed until December 8 at 1:00 P.M. On December 8, Hendley filed suit in the district court for the Southern District of Georgia, requesting that the district court enjoin the defendant from conducting the disciplinary hearing and from interfering with his employment. Hendley alleged that the railroad's actions violated 45 U.S.C. § 60, which provides that it is a crime to discipline an employee for voluntarily furnishing information in connection with an FELA case.

The district court denied Hendley's request for an injunction, holding that the disciplinary procedure was a "minor dispute" within the exclusive jurisdiction of the National Railroad Adjustment Board. *Hendley v. Central of Georgia Railroad Co.*, 442 F.Supp. 482 (S.D.Ga. 1977) (citing the Railway Labor Act, 45 U.S.C. § 153 First (i)). Although the court agreed that violations of § 60 can be enjoined in connection with an on-going FELA case, it held that the section does not confer jurisdiction to override the mandatory grievance procedures where the case has been concluded and there is no possibility that evidence

---

[2] Rule R of the Southern Railway System's operating rules provides:

> Employees must not divulge to any person other than the shipper, consignee or a duly authorized public officer, any information concerning shipments of freight, which information might be used to the disadvantage of the patrons of the railroad.
>
> Information detrimental to the Company's interests must not be divulged except to proper officers or to others authorized to obtain such information.

will be suppressed through coercion by the railroad. 442 F.Supp. at 486. Hendley filed a notice of appeal and a motion for an injunction pending appeal, stating that he was being irreparably harmed by the defendant's actions, since he was now unemployed. The court denied his motion for an injunction pending appeal.

The disciplinary hearing was conducted on February 15, 1978, and Hendley was dismissed from service on February 25, 1978. Hendley then progressed his grievance through the procedures of the National Railroad Adjustment Board. On April 6, 1979, the Board reviewed the decision and found that Hendley's "disloyalty" warranted disciplinary action,[3] but that dismissal from service was "an extremely harsh penalty." Accordingly, the Board ordered that Hendley be reinstated with full seniority, but without back pay.

It is necessary first for us to define precisely the question that is before us. We are not faced with the broader issue of whether 45 U.S.C. § 60, a criminal statute, may be enforced through a district court's issuance of an injunction in a civil action. The parties agree, and the district court held, that an injunction may issue to prevent violations of § 60 in an ongoing FELA case. The question we must decide is whether a federal court also has jurisdiction, when

---

[3] In making this decision, the Board relied heavily on the fact that Hendley had entered the property of Union Camp without authorization. In its award, the Board stated, "This conduct can be characterized as being disloyal in the sense that the Claimant entered properties controlled by the Carrier without authorization and deprived the Carrier of the opportunity to be present at the accident scene when photographs were taken by the plaintiff." We cannot agree that this finding is supported by the evidence. Union Camp Corporation's property is not controlled by the Central of Georgia railroad; the railroad merely has operating rights to the tracks that run through the yard. Furthermore, even if the railroad did control the property, Hendley was not responsible for the attorney's entrance onto the property or his photographing of the area.

an FELA case has been concluded, to enjoin a disciplinary hearing used by a railroad for retaliatory purposes in violation of 45 U.S.C. § 60.

The Railroad Labor Act, 45 U.S.C. §§ 151-163, requires that railroads and railroad employees attempt to settle all minor disputes through grievance procedures. If those procedures fail, either party may appeal to the National Railroad Adjustment Board for compulsory arbitration. *Id.* § 153 First (i). An award of the adjustment board is final and binding on both parties, § 153 First (m), and the scope of judicial review of these awards is narrow. *See Central of Georgia Railway Co. v. United Transportation Union,* 353 F.Supp. 293, 302 (S.D.Ga.1973) (range of judicial review is "among the narrowest known to the law;" awards are final in the absence of fraud or jurisdictional defects). Minor disputes are those disputes which concern the application or interpretation of existing collective bargaining contracts, while "major disputes" concern changes in rates of pay or working conditions where the method of change is not provided in the existing labor contract. *REA Express, Inc. v. Brotherhood of Railway, Airline & Steamship Clerks,* 459 F.2d 226, 230 (5th Cir.), cert. denied, 409 U.S. 892, 93 S.Ct. 115, 34 L.Ed.2d 149 (1972). It is clear that a disciplinary hearing which is conducted in accordance with the procedures set out in an applicable collective bargaining agreement would usually constitute a minor dispute. *See Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.,* 305 F.2d 605, 607 (5th Cir. 1962); *Clark v. Seaboard Coast Line Railroad Co.,* 332 F.Supp. 380, 381 (N.D.Ga.1970). Thus, the National Railroad Adjustment Board has exclusive jurisdiction over this dispute, unless 45 U.S.C.§ 60 is found to override the statutory arbitration processes. We conclude that it does.

The authors of the Federal Employers' Liability Act, recognizing the danger that railroad agents would coerce or intimidate employees to prevent them from testifying, included 45 U.S.C. § 60 in the Act:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges *or otherwise disciplines or attempts to discipline* any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense; *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

[Emphasis added.] This section prohibits a railroad from disciplining or attempting to discipline an employee for furnishing information to an FELA plaintiff. Thus, any disciplinary investigation held solely for the purpose of punishing an employee for such conduct is violative of this statute. Hendley filed suit in federal district court, claiming that the scheduled disciplinary hearing was illegal for this reason. Nevertheless, the district court held that he had an adequate administrative remedy—the disciplinary hearing itself. The court listed a number of questions to be determined in the hearing and the subsequent arbitration, including whether "the disciplinary investigation [was] punitive or coercive in motive or effect." *Hendley v. Central of Georgia Railway Co.*, 442 F.Supp. at 486. The illogical result of such an interpretation is obvious. The employee may be forced to undergo an illegal investigation, and to present in that hearing his claim that the investigation is illegal.

The question of whether a particular disciplinary hearing violates § 60 involves interpretation of a federal statute, and is therefore a matter of federal jurisdiction. An analogous situation was presented in *Brotherhood of Railroad Trainmen v. Smith*, 251 F.2d 282 (6th Cir. 1958); a case arising under the Railway Labor Act. A railroad employee, the plaintiff in that case, was discharged for noncompliance with a Union Shop Agreement. He sought to enjoin enforcement of the discharge order on the ground that the agreement between the union and the railroad, as interpreted and applied, violated § 2 of the Railway Labor Act, 45 U.S.C. § 152. The union argued that the case was within the exclusive jurisdiction of the National Railroad Adjustment Board. Rejecting this argument, the court stated:

> The issue is whether the BRT Union Shop Agreement is valid if interpreted and carried out by the Railroad and BRT so as to deprive Smith and others similarly situated of their employment as conductors. Decision of this issue depends upon the meaning of the statute and over such a question the federal courts have jurisdiction.

251 F.2d at 285. *See also, Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 774-75, 72 S.Ct. 1022, 96 L. Ed. 1283 (1951). Similarly, in the instant case, the issue before the court does not involve interpretation of a collective bargaining agreement, an appropriate matter for resolution by arbitration. Rather, the question is whether a disciplinary hearing brought in accordance with the procedures established in the collective bargaining agreement violates a federal statute. This is a matter properly within the jurisdiction of the federal courts and is not a question to be determined by the administrative board.

This reasoning is also illustrated by a series of cases in which a railroad's conduct was found to be violative of the Railway Labor Act's prohibition against coercion to in-

fluence an employee's choice of a union representative, 45 U.S.C. § 152 Third. In *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.*, 305 F.2d 605 (5th Cir. 1962), a railroad employee who was also a union representative was notified that he would be investigated in accordance with the collective bargaining agreement. He was charged with disloyalty because of his efforts to prevent other employees from settling personal injury suits. He filed suit in federal district court, requesting an injunction on two grounds. First, he claimed that he was not an "employee" subject to Rule 72 of the railroad's operating rules, under which the investigation was brought. The court held that this question involved interpretation of the collective bargaining agreement, and thus was within the exclusive jurisdiction of the railroad adjustment board. Second, the employee claimed that the investigation was the result of a railroad plan to discredit the union and the plaintiff as the union representative. The plaintiff claimed therefore that the disciplinary hearing violated 45 U.S.C. § 152 Third, which prohibits coercion in employees' choice of a representative. The court held that the federal district court had jurisdiction to hear this claim, since the disciplinary hearing, if brought for the purpose of interfering with union representation, was a violation of the Railway Labor Act. The railroad objected that determination of the court's jurisdiction to enjoin the hearing would necessarily require a decision on the merits of the grievance against the plaintiff. The court responded:

> [T]he Railroad may not use the disciplinary proceedings as a guise for thwarting, or frustrating, or undermining the effectiveness of the Brotherhood, or Byington as its agent, in their statutory responsibilities as bargaining representatives. And in passing on the motivation for the disciplinary hearing, the Court may inescapably find itself in the position of necessarily passing on Byington's legal status as an employee, to his benefit or detriment, and the extent to which he therefore owes a duty of fidelity.

305 F.2d at 609. The court held that the plaintiff's claim, if proven, would entitle him to injunctive relief by the federal district court. *Id.*

Section 60, like § 152 Third, is a specific prohibition of certain conduct by a railroad.[4] A plaintiff may not be denied access to the federal courts when his employer uses its grievance procedures and disciplinary powers in direct violation of this statute. If an employee can show that the object of a railroad's investigation is to discipline the employee for furnishing information in an FELA case, then injunctive relief by a federal district court is "appropriate if not compelled." *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.*, 305 F.2d at 609; *see Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914, 918 (7th Cir. 1974).

Finally, a district court's ability to enjoin a hearing or conduct which violates § 60 is essential to effectuate the purpose of the section. In *Kozar v. Chesapeake & Ohio Railway Co.*, 320 F.Supp. 335 (W.D.Mich.1970), *affirmed in part and vacated in part*, 449 F.2d 1238 (6th Cir. 1971), a district court recognized the intimidating effect of any exercise of a railroad's power against an FELA witness:

> [R]ailroad employees are subject to considerable pressure if called to give testimony against their em-

---

[4] In a later case, *Brotherhood of Railroad Trainmen v. Southern Railway Co.*, 393 F.2d 303 (5th Cir. 1968), the plaintiff railroad relied on *Brotherhood of Railroad Trainmen v. Central of Georgia* and requested that the district court enjoin union activity alleged to have violated the general policy provisions of the Railway Labor Act. The court rejected this argument, stating that § 152 Third, the basis for injunction in the earlier case, was more than a general policy statement, since it "specifically prohibits interference by the carrier with the designation of representatives by the union." *Id.* at 307. This decision illustrates the similarities between § 152 Third and § 60, and the necessity of federal court jurisdiction to enjoin their violation. Both statutes involve much more than mere policy statements—they declare certain conduct unlawful and provide criminal penalties for violation.

> ployer. This pressure need not be the result of direct threats or arm-twisting; it is not necessarily the object of deliberate railroad policy. But whether by design or accident, the fact remains that these working men, through numerous contacts with supervisors and claim agents during the discovery process, often believe that a wrong step—defined by railroad rules (real or apparent) and interpreted by railroad officials—may result in sanctions, and that the wrong testimony—potentially costing the railroad large amounts of money—might arouse the displeasure of those in control of their livelihood. The tremendous power of a corporation like the Chesapeake and Ohio Railroad, coupled with its aggressive efforts to defeat the claims of those injured by its activities—even when the victims are their most valuable employees—can overawe and even cower those individuals upon whom an opposing party must rely to substantiate his claim.

320 F.Supp. at 369-70. If a railroad is allowed to discipline an employee for furnishing information to an FELA plaintiff, and the employee is required to submit to the hearing and to process his claim through arbitration before finally reaching the federal courts, the coercive effect is overwhelming. Employees who consider testifying in an FELA case will understandably hesitate if they know that they may be forced, as Hendley was, to undergo a formal investigation and possibly suspension for a lengthy period of time. The fact that the employee may ultimately prevail is of little assurance to one who faces possible unemployment for a year or more. Thus, the disciplinary procedure not only violates the mandate that an employer refrain from disciplining an employee for furnishing information, it also becomes a device the "effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest." 45 U.S.C. § 60.

For these reasons, we hold that a district court has jurisdiction, even after the conclusion of an FELA case, to enjoin any proceeding which is violative of § 60. We do not hold that an employee may never be disciplined for his conduct in connection with an FELA case. If, for example, an employee removed documents or confidential files from the railroad's offices, disciplinary action would be appropriate for violation of the company's rules. We simply hold that a federal district court has jurisdiction to determine whether a disciplinary hearing is brought for purposes violative of § 60, or whether the railroad is attempting to discipline the employee for a violation of lawful company rules.[5]

It is clear from a review of the testimony before the investigating board that the actions of Hendley which were the subject of the investigation are within the protection of § 60. The railroad apparently charged that Hendley had made arrangements for Moore to go onto the property of Union Camp, had driven him in on a locomotive, and had assisted him in photographing the accident scene. The testimony at the hearing showed that Hendley did not make arrangements for Moore to enter the property; he did not even know that Razook would be accompanied by his attorney until he was met by Razook and Moore on Union Camp property. The men did not drive or ride a locomotive into the area. Hendley did not photograph the

---

[5] The railroad argued that the plaintiff's appeal is moot, since the dispute has been processed to conclusion through the procedure of the National Railroad Adjustment Board. We find this contention to be without merit. The plaintiff initially requested that the court enjoin the railroad from conducting the proposed investigation and from interfering with the plaintiff's employment. Although the disciplinary proceeding itself has been concluded, the unlawful effects of the proceeding have not. The continued denial of back pay for the year that Hendley was unemployed is a present unlawful interference with Hendley's right of employment, and constitutes a continuing violation of § 60.

area or assist Moore in making photographs. Hendley's only "disloyalty" consisted of meeting Razook and his attorney on the property, discussing the physical layout of the tracks, and giving a deposition to be used in the case—conduct that falls within the protection of § 60.

Since Hendley's actions could not lawfully be the subject of disciplinary action and arbitration, any award made by the National Railroad Adjustment Board is null and void. We reverse, and remand to the district court to order that the award of the National Railroad Adjustment Board be set aside, and that Hendley receive full back pay for the time that he was suspended or unemployed as a result of the railroad's actions.

REVERSED and REMANDED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1058
D. C. Docket No. CA CV4-77-269

JAMES E. HENDLEY,
Plaintiff-Appellant,
versus

CENTRAL OF GEORGIA RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

Before TUTTLE, VANCE and KRAVITCH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

January 15, 1980

A true copy Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ SARAH L. HOLMES
Deputy
New Orleans, Louisiana March 20, 1980

ISSUED AS MANDATE: MARCH 20, 1980

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CV477-269

JAMES E. HENDLEY,

Plaintiff

VS.

CENTRAL OF GEORGIA RAILROAD COMPANY,

Defendant

December 28, 1977

ORDER

I

James E. Hendley is an employee of Central of Georgia Railroad Company which is a part of the Southern Railway System. He seeks an injunction against the defendant's pending disciplinary investigation growing out of his activities in connection with a co-employee's personal injury suit against Central under the Federal Employers' Liability Act.

Mr. Hendley is a switch engine foreman. It appears that in off-duty hours, he assisted Daniel Razook in the latter's personal injury action against Central and Union-Camp Corporation. He was present in a switch engine which carried one of plaintiff's attorneys (a former officer in the Switchmen's Union) onto Union-Camp's woodyard where photographs were made for use in the FELA action filed by Razook.[1]

---

[1] See Hendley's pre-trial deposition in the Razook case. He did not testify at the trial of the claim against Central of Georgia and Union-Camp Corporation. The pictures taken at the woodyard were used in the trial.

Following the trial and settlement of the damage suit, written notice was sent to Hendley scheduling a disciplinary investigation based on "disloyalty" and the violation of rule R of Southern Railway System's operating rules.[2] Hendley who has been suspended responded with a suit seeking injunctive relief in this Court. Jurisdiction is predicated upon 28 U.S.C. § 1331(a) [federal question]; 45 U.S.C. § 60 [prohibiting a carrier's prevention of an employee's volunteering information as to a claim to one in interest], and 45 U.S.C. § 56 [jurisdiction over personal injury cases under the Federal Employers' Liability Act].

Hendley maintains that the investigation is intimidatory in nature and is a palpable violation of 45 U.S.C. § 60. The disciplinary proceeding constitutes, plaintiff complains, a mere reprisal because Central was the loser in Razook's action for damages. Plaintiff argues that relief can and should be granted by this Court in the way of enjoining the imminent disciplinary investigation.

The Railroad contends that this Court is without jurisdiction to do so and that Mr. Hendley has no remedy in the courts until he has exhausted the procedures provided for in the collective bargaining contract and the Railway Labor Act, 45 U.S.C. §§ 151-159. Central takes the position that the statute in question establishes "primary exclusive jurisdiction" in the National Railroad Adjustment Board and the procedures created in that Act.

The scheduled investigation was postponed pending a decision by this Court as to the jurisdictional question. Briefs have been filed and oral argument heard.

---

[2] "Information detrimental to the Company's interests must not be divulged except to proper officers or to others authorized to obtain such information." The letter scheduling the hearing on the charge of disloyalty is dated December 1, 1977, immediately following the trial of the case in the Superior Court of Chatham County.

II

Under 45 U.S.C. § 60, which is an adjunct of the Federal Employers' Liability Act, any contract, rule or device is void that is intended or has the effect of preventing employees of a common carrier from voluntarily furnishing information to a person in interest as to the facts incident to the injury or death of an employee. Anyone who by threat, intimidation, contract, rule or device attempts to prevent the voluntary furnishing of information or who disciplines or attempts to discipline an employee for doing so is guilty of a criminal offense. 45 U.S.C. § 60. It was the intent of Congress to see to it that an injured employee could readily obtain all the available information from witnesses, particularly employees of the railroad company. *Dugger v. Baltimore & O. R. Co.*, 5 F.R.D. 334 (E.D., N.Y.). The purpose of the statute is to prevent the coercion of employees upon whom an employee claimant depends to substantiate his claim against the railroad. *Kozar v. Chesapeake and Ohio Railway Company*, 320 F. Supp. 335, 369-70, 383-85 (W.D., Mich.), reversed in part upon other grounds, 449 F.2d 1238 (6th Cir.). In *Kozar* the District Judge observed that where there are coercive practices by a carrier, "Every remedial weapon, including contempt, will be available to insure uninhibited exercise of federal rights." p. 386.

The Collective Bargaining Agreement between the Central of Georgia Railroad Company and the Switchmen's Union of which Mr. Hendley was a member provides for an investigation of grievances. Where the Railroad brings charges, the employee has full opportunity to hear the testimony of all witnesses and to present his side of the case. If the result of the investigation is disciplinary action or dismissal of the employee, there is a right of appeal to the next higher officer and from him to the next higher one. Article 18 of the Collective Bargaining Agreement.

Because of the huge backlog of minor disputes before the Adjustment Board, Congress amended the Act in 1966 to provide for the establishment of special adjustment boards to resolve disputes otherwise referable to the Board itself. The machinery created establishes a mandatory arbitration alternative. See *Brotherhood of Locomotive Engineers v. Denver & Rio Grande Western Railroad Company*, 411 F.2d 1115, 1118 (10th Cir.). The awards of the special adjustment boards are "final and binding upon both parties to the dispute." 45 U.S.C. § 153 First (m). The range of judicial review of an award by such a board is a narrow one. See *Central of Georgia Railway Company v. United Transportation Union*[*s*], 353 F. Supp. 293, 302 (S.D., Ga.).

The Railway Labor Act (45 U.S.C. §§ 151-163) contemplates and commands that the parties attempt to settle all minor disputes through grievance procedures, failing which either party has the right of recourse to compulsory arbitration by way of appeal to the National Railroad Adjustment Board. 45 U.S.C. § 153 First (i). A "minor" dispute generally concerns the meaning or proper interpretation and application of rules or working conditions under the collective bargaining agreement. Major disputes "look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Itasca Lodge 2029 of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Railway Express Agency Incorporated*, 391 F.2d 657, 662-664 (8th Cir.), quoting *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711, 723.

III

The logical extreme to which plaintiff's argument leads us is that a Railroad may not discipline an employee who aids a fellow employee in developing his case against the carrier. According to plaintiff, there can be no "disloyalty"

grievance since 45 U.S.C. § 60 makes a federal crime out of disciplinary reprisals by the carrier.

I cannot agree that that statute abolishes employer charges and grievances as to employee disloyalty. Internal disciplinary hearings at company level under a collective bargaining agreement constitute neither harassment nor other violation of 45 U.S.C. § 60. *Clark v. Seaboard Coast Line Railroad Company,* 332 F. Supp. 380, 381 (N.D., Ga.). See also *Seaboard Air Line Railroad Company v. Wilkinson,* 216 Ga. 338, 342.

Much in point is *Brotherhood of Railway and Steamship Clerks v. Atlantic Coast Line Railroad Company,* 154 F. Supp. 71 (E.D., N.C.), aff'd. 253 F.2d 753 (4th Cir.). The underlying facts in that case bear striking resemblance to those in the present case. A Union official who was an employee of ACL had assisted the attorney for another employee in the preparation of his FELA suit by surreptiously arranging for the access of a photographer to the Railroad's office building in order to take pictures of a spiral stairway on which plaintiff had been injured. The plaintiff was discharged following disciplinary proceedings pursuant to the bargaining agreement. The Railroad Adjustment Board found such termination of employment to be without cause. In the ensuing enforcement proceeding in connection with such award the district court reversed on the ground of the employee's disloyalty. On appeal to the Fourth Circuit that ruling was affirmed.

In the case of *Greenwood v. Atcheson, Topeka and Santa Fe Railway Company,* 129 F. Supp. 105 (S.D., Cal.) the employee sued for damages for wrongful discharge. He had previously processed his grievance through the National Railroad Adjustment Board which denied his claim and refused reinstatement. The District Court held that the award in question was final and that no remedy existed

beyond the administrative claim.[3] It found that 45 U.S.C. § 60 conferred no right of action on a plaintiff pursuant to the Federal Employers' Liability Act.

IV

Title 45 U.S.C. § 60 is a criminal, not a jurisdictional statute. I have little doubt that violations of that Section may be enjoined in connection with an on-going FELA case. See *Clark v. Seaboard Coast Line Railroad Company*, 332 F. Supp. 380, *supra; Kozar v. Chesapeake and Ohio Railway Company, supra*, 320 F. Supp. 335. Here, however, the Razook case has been tried and settled. There was no suppression of evidence through coercion by the Railroad. The purpose of the present suit for injunction is not to obtain relief under 45 U.S.C. § 60. It is to by-pass the mandatory remedies prescribed by Congress under the guise of the criminal statute. Clearly, plaintiff has an adequate administrative remedy under the law. It is no answer to say that proceedings under the National Railway Labor Act take too long.

The dispute involved in this case is part of the ordinary, diurnal grist of employee-employer relations. The questions involved in the disciplinary investigation include whether or not the conduct complained of constituted disloyalty. Was Switch Foreman Hendley merely voluntarily furnishing information for use in the suit against Central? Did Mr. Hendley have the right to furnish or provide same to a co-employee? Is the disciplinary investigation punitive or coercive in motive or effect?

---

[3] The Supreme Court agreed in *Union Pacific Railroad Company v. Price, supra*, 360 U.S. 617 that the submission by the plaintiff of his grievance to the Adjustment Board in respect to his discharge from employment precludes him from seeking damages in a subsequent common-law action. Congress never intented that the Railroad Adjustment Board should only render advisory opinions.

Such questions of fact (or law) are determinable under established grievance and arbitral procedures, contractual and statutory.

Awards of the special adjustment boards are, as stated, "final and binding upon both parties to the dispute." 45 U.S.C. § 153 First (m). The jurisdiction of the National Railroad Adjustment Board and its remedial processes is exclusive, primary and mandatory in the case of minor disputes under collective bargaining agreements. The statutory procedures represent a comprehensive system for resolving such controversies and a party may not turn to the courts for relief before the administrative body has first evaluated and decided the dispute. See *Slocum v. Delaware Lackawanna & Western Railroad Co.*, 339 U.S. 239; *Union Pacific Railroad Co. v. Price*, 360 U.S. 601, 616; *International Brotherhood of Electrical Workers v. Washington Terminal Company*, 473 F.2d 1156, 1172-73 (D.C. Cir.), cert. den. 411 U.S. 906. The role of the courts in adjustment of labor disputes does not begin until there has been exhaustion of the contractual and statutory arbitration processes. *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 325-26.

The courts that have considered the effect of 45 U.S.C. § 60 on jurisdiction in suspensions or terminations growing out of charges of employee perfidy have concluded that that provision of FELA does not preclude, in a proper case, such punishment. Nor does it confer jurisdiction upon the district courts to decide that issue. I have read the authorities relied on by plaintiff's counsel and do not find them to be persuasive.[4]

---

[4] A few words probably should be said concerning *Texas & New Orleans Railroad Company v. Brotherhood of Railway & Steamship Clerks et al.*, 281 U.S. 548. The Railway Labor Act of 1926 contained a provision that representatives of the disputant parties should be selected by the respective parties without influence or

Finding neither a clear and specific grant of federal jurisdiction nor any statutory overriding of the remedies established in labor disputes, the injunctive relief sought must be and is denied and the complaint dismissed. The defendant Railroad is free to reschedule the disciplinary investigation and to proceed therewith.

This December 28th, 1977.

/s/ ALEXANDER A. LAWRENCE
Judge, United States District Court
Southern District of Georgia

---

coercion by the other. The defendant Railroad had recognized a company Union as the representatives of its clerical parties and an injunction against it was granted below. Defendants contended in the Supreme Court that the statutory provision referred to created a mere abstract right without provision for enforcement by legal proceedings. The Court affirmed. It said: "The definite prohibition which Congress inserted in the Act cannot . . . be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." At 569.

But this is not to say that a right to be free from coercion as set forth in a criminal law operates to displace a statutory system of mandatory arbitration embracing the very controversy between the parties in respect to loyalty.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action File No. CV477-269

JAMES E. HENDLEY

vs.

CENTRAL OF GEORGIA RAILROAD COMPANY

JUDGMENT

This action came on for consideration before the Court, Honorable Alexander A. Lawrence, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that in accordance with such decision Judgment is rendered in favor of the Defendant, CENTRAL OF GEORGIA RAILROAD COMPANY, and against the Plaintiff, JAMES E. HENDLEY. Costs are assessed against Plaintiff.

Dated at Savannah, Georgia, this 28th day of December, 1977.

LOUIS E. AENCHBACHER
Clerk of Court

By /s/ MICHAEL L. ARIUTF
Deputy Clerk

APPENDIX F

PUBLIC LAW BOARD NO. 2086

Case No. 7

Award No. 1

Parties to Dispute:

CENTRAL OF GEORGIA RAILROAD COMPANY

vs.

UNITED TRANSPORTATION UNION

April 6, 1979

Statement of Claim:

(a) Claim on behalf of Savannah Yardman James E. Hendley for reinstatement to service with seniority unimpaired, compensation for all lost time earnings and all benefits deprived of, including but not limited to, holiday pay and health and welfare benefits account suspended from service on December 1, 1977.

(b) Claim on behalf of Savannah Yardman James E. Hendley for reinstatement to service with seniority unimpaired, compensation for all lost time earnings and all benefits deprived of, including but not limited to, holiday pay and health and welfare benefits on account of being suspended from service on December 1, 1977, and later being dismissed from service on February 25, 1978.

Findings: The Board, upon the whole record and all the evidence, finds that:

The Carrier and the employee involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as amended.

The Board has jurisdiction over the dispute involved herein.

The Parties to said dispute were given due notice of hearing thereon.

The Claimant in this case was a Yard Foreman with over twenty-five years of service and was Local Chairman for the past six years. One of the Claimant's fellow employees filed a personal injury lawsuit against the Carrier and Union Camp Corporation in December of 1976. In the preparation of his lawsuit the plaintiff was confused about the exact physical description of the location where he was injured. The Claimant assisted the plaintiff in his efforts to clarify this confusion about the location of the injury. The Claimant, while off duty, met the plaintiff and his personal attorney at the entrance to the Union Camp Yard and they proceeded onto the property which was either owned or controlled by the Carrier. They arrived at the scene of the personal injury and the plaintiff's attorney photographed the area. The Claimant, the plaintiff and his attorney then left the premises together.

On November 11, 1977 the Claimant appeared and gave his deposition in the plaintiff's lawsuit. The Carrier's attorney and Claim Agent were present at this deposition in which the Claimant related his visit to the accident scene. The Carrier's Claim Agent did not have any authority over the Claimant. After November 11, 1977, the Carrier's Superintendent, who had authority over the Claimant's conduct, was involved in the preparation of the defense in the civil action and reviewed the Claimant's deposition. Following this review the Superintendent charged the Claimant with disloyalty and suspended him on December 1, 1977, pending an investigation. The Claimant submitted a claim protesting this suspension on February 14, 1978. On February 15, 1978 an investigation was held. On February 25, 1978, the Claimant was notified of his dismissal

from service. The Claimant then submitted a claim protesting his dismissal.

Article 21 (b) of the schedule agreement provides:

> If an appeal is taken from decision rendered, it shall be presented to the next highest officer without delay and not later than 60 days from date of decision.

The Claimant was suspended from service on December 1, 1977 and did not file his first claim until February 14, 1978, which was more than sixty (60) days following the Carrier's suspension decision. The Claimant's initial claim, therefore, must be denied without any consideration of the merits. The Claimant's second claim protesting his dismissal, however, was timely filed.

This Board has reviewed the entire record in this case and finds that the Claimant was afforded a fair, impartial and timely hearing. The record shows the Claimant assisted another employee who was pursuing a civil action for personal injuries against the Carrier. The Claimant's conduct was designed to show the plaintiff the actual conditions at the scene of the accident. There was no intent to distort the facts or evidence in the civil action. There was no intent to encourage the litigation against the Carrier. The Claimant merely intended to assist the plaintiff so he could accurately describe the physical conditions at the accident scene. The plaintiff could have used available discovery procedures to acquire the same evidence. If such procedures had been used, the defendants in the civil action could have been present. Essentially, the Claimant has deprived the Carrier of the opportunity to be present at an examination of the accident scene by the plaintiff.

This conduct can be characterized as being disloyal in the sense that the Claimant entered properties controlled

by the Carrier without authorization and deprived the Carrier of the opportunity to be present at the accident scene when photographs were taken by the plaintiff. Even though the Claimant's conduct was contrary to the Carrier's procedural interests, his primary motivation was to assist a fellow employee in ascertaining the truth. There was no intent to undermine the Carrier's position in the civil action. Photographs taken at the accident scene were used in the trial of the civil action, but the Claimant did not testify. There was no evidence that these photographs were inaccurate or misleading. There was no evidence that the plaintiff in the civil action was not entitled to acquire such photographs for the preparation and trial of his lawsuit. There was evidence that the plaintiff was not entitled to acquire these photographs through the Claimant.

The Claimant has argued that as a union representative and fellow employee, he had the right to assist the plaintiff during off duty hours. Such conduct would not be considered disloyalty. The Claimant, however, provided more than off duty assistance when he made an unauthorized entry upon the properties controlled by the Carrier. The Claimant has misinterpreted his right and duty to assist his fellow employee and union member. He has been disloyal to the Carrier.

This offense warrants disciplinary action. The penalty invoked by the Carrier must be appropriate for the proven offense. It cannot be arbitrary, capricious or discriminatory. Given the nature of the Claimant's conduct, his long service and the absence of any wilful misconduct, dismissal from service is an extremely harsh penalty. This Board, therefore, has concluded that the Claimant should be reinstated with full seniority, but without any back pay.

AWARD

1. The first claim is hereby denied.

2. The second claim is hereby sustained, in part, in accordance with the findings. The Claimant shall be reinstated with full seniority, but without any back pay. Award to be complied with within thirty (30) days from date of this award.

PUBLIC LAW BOARD NO. 2086

/s/ ROBERT G. WILLIAMS
Neutral

/s/ R. E. LOOMIS
Carrier Member

/s/ J. M. HICKS, Dissenting
Organization Member

Date: April 6, 1979

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1058

JAMES E. HENDLEY,
Plaintiff-Appellant,

versus

CENTRAL OF GEORGIA RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion January 15, 1980, 5 Cir., 197—, —— F.2d ——).

(March 12, 1980)

Before TUTTLE, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local

Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ ELBERT P. TUTTLE
United States Circuit Judge

SUPREME COURT, U.S.
FILED
JUL 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1922

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,

versus

JAMES E. HENDLEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BILLY E. MOORE
B. RANDALL BLACKWOOD
P. O. Box 2565
Columbus, Georgia 31902

Counsel for Respondent

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

TABLE OF CONTENTS

Page

QUESTION PRESENTED 1

STATEMENT 2

REASONS FOR DENYING THE WRIT 8

CONCLUSION 15

CERTIFICATE OF SERVICE 16

Appendix A — Text of Rule R of Southern Railway System Operating Rules 1a

Appendix B — Letter of Central's Superintendent of Terminals, W. D. Cogdell, to James E. Hendley of December 1, 1977 ..... 3a

TABLE OF AUTHORITIES

CASES:

Andrews v. Louisville & Nashville Railroad Company, 406 U.S. 320 14

Brotherhood of Railroad Trainmen v. Central of Georgia Railway Company, 305 F.2d 605 (5th Cir. 1962) 2

Farmer v. United Brotherhood of Carpenters and Joiners, 430 U.S. 290 14

Marbury v. Madison, 1 Cranch 137, 162, 163, 2 L.E. 60 ..... o

Parden v. Terminal Railway Company of Alabama State Docks Department, 377 U.S. 194, 84 S.Ct. 1207 (1964) 12

TABLE OF AUTHORITIES (Continued)

Page

Daniel Razook v. Central of Georgia Railroad Company and Union Camp Corporation, C.A. No. 12233-C, Superior Court of Chatham County, Georgia 2,3,13

Texas and N.O. Railroad Company v. Brotherhood of Railway and Social Security Clerks, 281 U.S. 568, 50 S.Ct. 433, 74 L.E. 1034 8,9

STATUTES:

Federal Employers' Liability Act

45 U.S.C. §60 3-15
45 U.S.C. §56 9

Railway Labor Act, 45 U.S.C. §153 4

45 U.S.C. §153(2) 5

MISCELLANEOUS:

Hearings on S. 1708 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 1st Sess. (1939) 10,11

Rule R of Southern Railway System Operating Rules 3,4,11,12

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-1922

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,

versus

JAMES E. HENDLEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent, James E. Hendley, files this brief in opposition to the petitioner's prayer that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

QUESTION PRESENTED

May a United States District Court protect from discharge a railroad employee witness who furnished information and testified by deposition in a Federal

Employers' Liability Act case by enjoining a disciplinary hearing of the railroad scheduled to be conducted after the conclusion of the FELA case where the investigation violates provisions of the Act intended to protect employees who furnish information pertaining to FELA claims?

STATEMENT

This action was brought to enjoin the firing of an employee with over 25 years service as a switchman with the Central of Georgia Railroad Company when he was summarily discharged from his job one day after the conclusion of the FELA case of *Daniel Razook v. Central of Georgia Railroad Company and Union Camp Corporation.*[1] Razook had filed a claim under the FELA against Central based on an injury sustained by him on the Union Camp Corporation premises in Savannah, Georgia. The injury occurred at night, and Razook was confused as to the layout and track numbers where he was injured while on duty as an employee of the Central of Georgia Railroad Company. He called upon his union Local Chairman, respondent Hendley, to assist him in establishing the correct track number and location by meeting him while both employees were off duty at the Union Camp premises in Savannah.[2] Hend-

---

1 *Daniel Razook v. Central of Georgia Railroad Company and Union Camp Corporation,* Civil Action Number 12233-C, Superior Court of Chatham County, Georgia.

2 Hendley had served as Local Chairman of the United Transportation Union for over 6 years and was charged with the responsibility to assist Union members in preserving their employee rights. See, e.g. *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Company,* 305 F.2d 605 (5th Cir. 1962).

ley met Razook at the Union Camp premises and informed him of the correct number of the track on which Razook was injured. Razook had his attorney along and the attorney attempted to record the track identity and location by photograph.

Hendley later was called by the Railroad as a witness and gave deposition testimony in the *Razook* case on November 11, 1977. On December 1, 1977, one day after the conclusion of the *Razook* FELA case, Hendley received a letter from the Railroad charging him with "disloyalty" and violation of Rule R of the operating rules of the Railroad.[3] Central's Rule R as applied to this case provides:

> "Information detrimental to the Company's interests must not be divulged except to proper officers or to others authorized to obtain such information."[4] (Ibid)

Hendley through counsel advised the Railroad by letter that the FELA, 45 U.S.C. §60, forbade this re-

---

3 The full text of the letter charging Hendley with employee Rule violations appears in Appendix B.

4 The operating rules of the Central of Georgia Railroad appear in a looseleaf booklet published by the Southern Railway System of which the Central is an entity. Rule R as it appears in full in the operating rules is as follows:

R. Employees must not divulge to any person other than the shipper, consignee or a duly authorized public officer, any information concerning shipment of freight, which information might be used to the disadvantage of the patrons of the Railroad.

Information detrimental to the Company's interests must not be divulged except to the proper officers or to others authorized to obtain such information.

prisal action. Central nonetheless scheduled a disciplinary hearing for December 8. The case at bar was then filed to enjoin Central from conducting a retaliatory disciplinary hearing purposed to harrass Hendley for his role as a witness in an FELA claim on the ground that this particular application of Rule "R" and the dragnet "disloyalty" charge violated Section 60.

The case was submitted to the District Court on briefs. The Court denied the request for an injunction and dismissed the complaint on the grounds that it lacked jurisdiction over this "minor" labor dispute because the Railway Labor Act gave primary exclusive jurisdiction over such matters to the Railway Adjustment Board, and that 45 U.S.C. §60 did not empower the Court to prevent the Railroad from punishing a local union chairman who assisted a fellow employee in investigating an FELA claim after the claim was resolved. Whether the National Railway Adjustment Board administrative law process provided for the protection of rights under 45 U.S.C. §60 to certain conduct was not addressed in the court opinion. Rather, the District Court focused on the operation of the administrative grievance machinery to settle minor labor disputes such as the discipline of an employee which ordinarily by virtue of the Railway Labor Act, 45 U.S.C. §153, come under the exclusive jurisdiction of the National Railway Adjustment Board. The District Court glossed over the singular distinction here that the focus of Hendley's discipline charge regarded not a labor dispute or even any misconduct as an employee,

but his role as a witness furnishing information while off duty to a member of his union local who used the information to present an FELA claim. The Court concluded that "[t]he dispute involved in this case was part of the ordinary, diurnal grist of employee/employer relations," in that "[t]he questions involved in the disciplinary investigation include whether or not the conduct complained of constituted disloyalty"; and "[s]uch questions of fact (or law) are determinable under established grievance and arbitral procedures, contractural and statutory." (Petitioner's App. D, pp. 23a-24a). The District Court denied Hendley's request for injunctive relief.

Central held its investigation. Based on charges of "disloyalty", Hendley was discharged for his role in assisting Razook in the preparation of his FELA claim. Hendley sought review of the Railroad's decision by a Public Law Board under the Railway Labor Act, 45 U.S.C. §153(2), and since implicitly the District Court ruled that a Public Board would be the forum to determine whether and how that FELA statute applied, he was relegated to raising and having determined on the merits his claim of violation of 45 U.S.C. §60 by that administrative board. Oddly, the District Court by default caused the application of a vital FELA statutory protection to be left for determination by an administrative agency lacking both the skill to adjudicate statutory construction and the power to enforce statutory sanctions. The Board of course did not attempt to rule on the application of 45 U.S.C. §60, and properly so, it

being out of their area of expertise, but did find Central's discipline of Hendley wrongful in principle and ordered him reinstated immediately.

In the interim the order of the District Court had been appealed, and the United States Court of Appeals for the Fifth Circuit was the only forum in which the depositions, affidavits, court order, public law board award, and carrier investigation transcript were available for simultaneous consideration. The Court of Appeals made a thorough, exacting review of the record. The Court defined the precise question to be whether a Federal Court had jurisdiction after the conclusion of an FELA case to enjoin a disciplinary hearing alleged to be used by a Railroad for retaliatory purposes in violation of 45 U.S.C. §60, and held that the question of whether a particular disciplinary hearing does violate Section 60 involves an interpretation of a Federal Statute, and therefore is a matter of Federal jurisdiction. (Petitioner's App. B, pp. 8a-11a). The Court was careful to note that the issue before the Court "does not involve interpretation of a collective bargaining agreement, an appropriate matter for resolution by arbitration. Rather, the question is whether a disciplinary hearing brought in accordance with the procedures established in the collective bargaining agreement violates Federal Statutes." (Id. p. 11a). It concluded, "[t]his is a matter properly within the jurisdiction of Federal Courts and is not a question to be determined by the administrative board" (Id. p. 11a). The Court observed that "Section 60, like Section 152 Third [of the Railway Labor Act], is a specific prohibi-

tion of a certain conduct by a Railroad;" (Id. p. 13a), and held that "[a] District Court's ability to enjoin a hearing or conduct which violates Section 60 is essential to effectuate the purpose of the Section." (Id. p. 13a). "If a Railroad is allowed to discipline an employee for furnishing information to an FELA Plaintiff, and the employee is required to submit to the hearing and to process his claim through arbitration before finally reaching the Federal Courts, the coercive effect is overwhelming." (Id. p. 14a). The Court pondered the chilling effects that the Central's actions against Hendley would have on other employees who would consider testifying in an FELA case and whether it would serve as a device the "effect of which shall be to prevent employees of any common carrier from furnishing voluntary information to a person in interest." (Id. p. 14a). Contrary to the petitioner's repeated suggestion in its brief, the Court specifically limited the scope of its holding, declaring that "we do not hold that an employee may never be disciplined for his conduct in connection with an FELA case." (Id. p. 15a) The Court identified several instances where such disciplinary action would be warranted, but merely held that the Federal Court had jurisdiction to determine whether the disciplinary hearing is brought purely for purposes violative of Section 60, or whether the Railroad is attempting to discipline the employee for violation of lawful company rules. (Id.) The Court concluded that the actions of Hendley which were the subject of the investigation were within the protection of Section 60, and that being within the ambit of that protection, Hendley's conduct as a witness could not lawfully be the subject of disciplinary action and arbitration. The

Court reversed the District Court decision and remanded holding that the District Court did have jurisdiction after the conclusion of the FELA case to enjoin a proceeding which violates Section 60. The award of the National Railroad Adjustment Board was ordered to be set aside to the extent that it did not grant Hendley back pay for the time that he was suspended or unemployed.

Central petitioned for rehearing en banc to the United States Court of Appeals for the Fifth Circuit. The petition was denied.

REASONS FOR DENYING THE WRIT

I.

The decision below upholds the clear legislative intent of 45 U.S.C. §60, and traces carefully the distinction fundamental to the federal regulatory scheme between labor disputes relating to employee interests arising from collective bargaining agreements that are proper subjects for administrative resolution on the one hand and legal issues centering on the interpretation of legal rights and remedies granted by statute which the federal courts are peculiarly equipped to adjudicate. Whether Section 60 implicitly creates a civil remedy does not determine federal court jurisdiction in this instance. Hendley seeks not a civil remedy, but protection by a redress that Congress delegated to the court. The United States Supreme Court recognized in *Texas and N.O. Railroad Company v. Brotherhood of Railway and Social Security Clerks*, that:

> "While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded." 281 U.S. 568, 50 S.Ct. 433, 74 L.E. 1034.

Fundamental to our system of laws is the principle that the creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. This is true whether the prohibition be one of interference or coercion in connection with the choice of union representatives, or the exercise of rights as union representatives to assist or volunteer information regarding an FELA claim. The right is created and the remedy exists. *Marbury v. Madison*, 1 Cranch 137, 162, 163, 2 L.E. 60; *Texas and N.O. Railroad Company*, supra. Section 60 was enacted as part of the Federal Employers' Liability Act, not the Railway Labor Act, so that its enforcement falls under Section 56 of the Act which gives United States District Courts jurisdiction to prohibit violations. The District Court below did recognize that Congress intended that an injured employee be able to obtain readily information from witnesses, particularly employees of the Railroad, the statute being purposed "to prevent the coercion of employees upon whom an employee-claimant depends to substantiate his claim against the Railroad." (Petitioner's Appendix D, p. 20a, citations omitted). Under the construction of the Railway Labor Act suggested by the petitioner, the right created

under Section 60 would be illusory in that a claimant or witness such as Hendley must languish before an administrative law board that lacks the jurisprudential skill to interpret the right and lacks the power to apply the statutory protection. To read out of Section 60 a right of protection by a federal court under the Federal Employers' Liability Act results in a right created without a remedy, making enaction of the Section pointless, and ignores the legislative intent of Section 60.

II.

The 76th Congress in 1939 conducted hearings on legislation proposed by President Roosevelt to determine whether significant abuses existed on the part of Railroad carriers in discouraging would-be claimants from pursuing their rights provided by the Federal Employers' Liability Act for injuries sustained during their employment with the Railroad. Information was submitted by the Railroads and employee unions. Senate Report number 661 that accompanied Senate Bill 1708 from the committee on the judiciary states the objectives of the Bill that was later adopted as Section 10 of the Federal Employers' Liability Act, 45 U.S.C. §60:

> "It prohibits the promulgation or enforcement of rules which penalize railroad employees for giving information concerning accidents to the injured person or his representative."

The report as it relates to the amendment to Section 10 identified exactly the type problem confronting Hendley:

> "A substantial number of railroads subject to the Employers' Liability Act have promulgated rules which prohibit employees from giving information concerning an accident to anyone excepting certain specified company officials and claim agents. The purpose of the amendment under consideration is to prohibit the enforcement of such rules and permit those who have information concerning the facts and circumstances of personal injury to give statements to the injured employee or his dependents, or to someone authorized to represent him or them." Senate Report 661 at page 5.[5]

Rule R of the Railroad's Operating Rules provides in pertinent part:

> "Information detrimental to the company's interests must not be divulged except to proper officers or to others authorized to obtain such information." (Appendix A, p. 2a)

---

5 The Senate Bill number 1708 was approved by the conference committee reported in conference report number 1463, dated August 4, 1939. The Bill as it came out of the conference committee was approved by the House and the Senate, was examined and signed into law by the President. It appears as Section 10 of public law 76-382, an adjunct of the Federal Employers' Liability Act now appearing as 45 U.S.C. §60.

The Railroad here relied on this rule to discipline an off duty employee for giving information regarding a correct track location which was a material fact in an FELA claim, charging him with "disloyalty", a term so vague it is meaningless. Rule R on its face violates Section 60. The prohibition of rules such as Rule R which seek to censor the release of information was identified by the United States Supreme Court in an opinion by Justice Brennan in *Parden v. Terminal Railway Company of Alabama State Docks Department*, 377 U.S. 194, 84 S.Ct. 1207 (1964), where a rule of the Terminal Railway Company was noted that provided:

> "Employee must not make any statement, either oral or written, concerning any accident, claim or suit in which the company is, or may be involved, to any person other than [an] authorized representative of the railroad, without permission, [*e*]*xcept in cases arising under the Federal Employers' Act, otherwise known as 'an act relating to the liability of common carriers by railroad to their employees in certain cases.'* " (emphasis added).

The Supreme Court stated that as to such rules, "[t]he exception for cases arising under the FELA is required by 45 U.S.C. §60." 377 U.S. at 196, 84 S.Ct. at 1215, footnote 14.

Rule R of the Southern Railway System is artfully drafted to discourage Railroad employees from giving information to others or their representatives regarding claims under the FELA. Such a regulation is facially

defective and, as applied in the context of respondent Hendley's case, constitutes flagrant violation of the legislative intent and purpose of Section 60, and the statutory prohibition. The gross error of the District Court was in ruling that after the conclusion of the *Razook* FELA case, Section 60 did not apply. It must be remembered that the purpose of Section 60 is also to stave off the chilling effect of retaliatory actions against prospective future witnesses in FELA claims protected by the Act. Rule R violates Section 60 and under the language of that Section "any . . . rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntary information to a person in interest as to the facts incident to the injury or death of any employee, shall be void . . ." This was the opinion and judgment of the court below, and no writ need be issued to disturb this well reasoned interpretation of law.

III.

The petitioner's theme is a familiar one: if the lower court decision stands, the nation's economy will falter. The petition assails the decision of the Court below as a "dangerous precedent" that will derail the entire grievance machinery of the Railway Labor Act. Do not be mislead. The Railroad acted to punish Hendley for furnishing information to a fellow employee and FELA claimant, and for once its motive was so obvious that it was caught violating the FELA provision that prohibits such action. The respondent doubts that such a

fact circumstance will ever recur. The holding of itself may serve to severely limit the number of instances where such a cause of action would arise in that it furthers the legislative purpose of Section 60 by making railroads more circumspect of the manner in which they would attempt to dampen the climate for FELA claims.

The Railway Labor Act machinery is not challenged by this decision and it in no way alters the present scheme of things. The Courts have always adjudicated legal issues concerning statutorily prohibited activity. Administrative agencies decide and resolve labor disputes under the Railway Labor Act. There is no overlap or entanglement caused here between the role of the Courts and that of the labor agreements process. The cases relied on by the petitioner, *Andrews v. Louisville & Nashville Railroad Company*, 406 U.S. 320, and *Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 290, are inapposite. *Andrews* dealt not with a person who was seeking protection of a statutory right under FELA Section 60, but a claim under the general law of contracts couched in a form to avoid jurisdiction under the Railway Labor Act. That decision has no bearing on the case at bar. Nor does *Farmer* offer any enlightening principle for the Court to apply here. In *Farmer* the Court was concerned with an allegation of tort injury under State law and merely restated long established principles that each government entity must do its part in keeping the regulatory scheme on track. Hendley seeks no damages in tort. He seeks to invoke the protection of Section 60 to keep the Railroad from firing him for furnishing information to a fellow employee,

union member, and an FELA claimant. If Section 60 does not afford that protection, it is worthless.

CONCLUSION

The decision of the Fifth Circuit Court of Appeals is sound and in keeping with well established case law, that is; Federal Courts interpret federal laws and Administrative Law Judges interpret matters arising under collective bargaining agreements between railroad management and the various unions. The decision of the lower appeals court merely reaffirms the fact that the interpretation of a Federal Statute is within the exclusive jurisdiction of the Federal Courts and such legal issues are without the jurisdiction of any administrative panel. The decision of the Fifth Circuit Court of Appeals clearly demonstrates that the issue presented is not the policy of Congress favoring arbitration of disputes under collective bargaining agreements, rather, the orderly, efficient flow of commerce free of illegal practices in violation of the laws of the United States of America. The petition for a writ of certiorari should be denied.

Respectfully submitted,

BILLY E. MOORE

B. RANDALL BLACKWOOD
P. O. Box 2565
Columbus, Georgia 31902

CERTIFICATE OF SERVICE

The undersigned attorneys certify that on the ____ day of July, 1980, they served three copies of the foregoing Brief in Opposition to a Petition for Writ of Certiorari upon the opposing counsel by placing same in the United States Mail with proper postage affixed, addressed to:

Charles A. Horsky
Donna L. Kohansky
Covington & Burling
888 — 16th Street, N.W.
Washington, D.C. 20006,

and

William P. Stallsmith, Jr.,
John B. Miller,
Edgar A. Neely Jr.,
Ellsworth Hall, Jr.,
Central of Georgia Railroad Co.
P.O. Box 1808
Washington, D.C. 20013

All parties required to be served have been served.

BILLY E. MOORE

B. RANDALL BLACKWOOD

APPENDIX A

SOUTHERN RAILWAY SYSTEM

OPERATING RULES

The rules herein set forth govern operations on the lines of Southern Railway System. The words "railroad" or "railway" or "Company" herein cover any company whose management by proper order makes these rules effective.

All previous Operating Rules applicable to System companies are hereby superseded. To the extent previous bulletin instructions or special instructions are inconsistent herewith, and only to that extent, they are hereby superseded.

Further instructions may be issued by proper authority.

L. S. Crane
Executive Vice-President,
Operations

Effective June 1, 1970
Revisions effective as dated

Page Revised
May 1, 1972

* * *

R. Employees must not divulge to any person other than the shipper, consignee or a duly authorized public officer, any information concerning shipments of freight, which information might be used to the disadvantage of the patrons of the railroad.

Information detrimental to the Company's interests must not be divulged except to proper officers or to others authorized to obtain such information.

APPENDIX B

SOUTHERN RAILWAY SYSTEM
Central of Georgia Railroad Company
P.O. Box 428
Savannah, Georgia 31402

December 1, 1977

Mr. J. E. Hendley
410 Delores Drive
Savannah, Ga. 31406

Dear Mr. Hendley:

Please arrange to report for formal investigation to be held in the Conference Room, Dillard Yard Office, Savannah, Ga., at 11:00 A.M. on Friday, December 2, 1977.

You are hereby charged with disloyalty to the Central of Georgia Railroad Company in that you accompanied and assisted Mr. Billy Moore onto the property of the Union Camp Corporation on an unknown date for the purpose of making photographs of Union Camp Corporation's property for use in a law suit against the Central of Georgia Railroad Company and Union Camp which is in violation of rule "R" of the book of operating rules of Southern Railway System.

You may have representatives and/or witnesses present at this investigation in your behalf, if desired, as provided by your schedule agreement.

Please acknowledge receipt of this letter by signing the attached copy.

Sincerely,

/s/ W. D. COGDELL
W. D. Cogdell
Sup't of Terminals

Supreme Court, U. S.
FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

No. 79-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,

v.

JAMES E. HENDLEY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONER

CHARLES A. HORSKY
DONNA L. KOHANSKY
888 - 16th Street, N.W.
Washington, D.C. 20006
Tel: (202) 452-6076

Counsel for Petitioner

WILLIAM P. STALLSMITH, JR.
JOHN B. MILLER
EDGAR A. NEELY, JR.
ELLSWORTH HALL, JR.
P.O. Box 1808
Washington, D.C. 20013

Of Counsel

TABLE OF CONTENTS

Page

I. Respondent's View of the "Scheme of Things" Is Erroneous 2

II. There Was a Clash Between the Results Reached by the Court Below and the Adjustment Board 5

III. This Is Not a Dispute Based on the Rights and Duties of a Union Representative 6

IV. Whether Section 60 Was Violated Is Not the Question Presented 7

CONCLUSION 8

TABLE OF AUTHORITIES

CASES:

Andrews v. *Louisville & Nashville Railroad*, 406 U.S. 320 2

Brotherhood of Railroad Trainmen v. *Central of Georgia Railway*, 305 F.2d 605 (5th Cir. 1962) .. 6n.

Chrysler Corp. v. *Brown*, 441 U.S. 281 3

Farmer v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 2

Magnuson v. *Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978) 5

Marbury v. *Madison*, 5 U.S. (1 Cranch) 87 ..... 3n.

Order of Railroad Telegraphers v. *Railway Express Agency, Inc.*, 321 U.S. 342 4

Parden v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 ..... 7n.

Page

Railway Labor Executives Associaton v. *Atchison, Topeka & Santa Fe Railway*, 430 F.2d 994 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971) 5

Texas & New Orleans Railroad v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 ..... 3n.

Union Pacific Railroad v. *Sheehan*, 439 U.S. 89 (*per curiam*) 4

STATUTES:

Federal Employers' Liability Act
45 U.S.C. § 56 ..... 3n.
45 U.S.C. § 60 .....2, 3, 3n., 5n., 6, 7, 7n.

Railway Labor Act, 45 U.S.C. § 153 First 2, 4
§ 153 First (i) 7
§ 153 First (m) 4
§ 153 First (p) ..... 4n.
§ 153 First (q) ..... 4n.

No. 79-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,

v.

JAMES E. HENDLEY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

Respondent does not challenge in any real sense the reasons advanced in the Petition for granting the writ. However, he does endeavor to obscure and divert attention from the single issue of overriding significance presented by this case: the integrity of the Railway Labor Act's disputes resolution machinery—and the wise Congressional policy favoring arbitration that it embodies—when that machinery is challenged by resort to other forums. Indeed, Respondent would deny that this important Congressional policy is involved here at all. (Br. Opp., p. 15.) Thus, although the reasons we believe warrant grant of the writ are adequately stated in the Petition, we believe a Reply is warranted to correct several assertions contained in the Brief in Opposition.

I. Respondent's View of the "Scheme of Things" Is Erroneous.

Respondent does not deny that this is a wrongful discharge dispute, resolution of which this Court has made clear is within the exclusive province of the National Railroad Adjustment Board pursuant to the command of the Railway Labor Act, 45 U.S.C. § 153 First. *Andrews* v. *Louisville & Nashville Railroad,* 406 U.S. 320. Instead, he contrives an entirely different and erroneous "scheme of things" (Br. Opp., p. 14) in which the decision below more conveniently fits. We demonstrate below the errors in Respondent's "scheme."

1. Respondent's "scheme of things" rests on an asserted distinction between "labor disputes relating to employee interests arising from collective bargaining agreements" and "rights and remedies granted by statute" (Br. Opp., p. 8), the latter of which he terms "legal issues" (*id.*, p. 14). This distinction is imaginary. As pointed out in the Petition (p. 8), to the extent that Respondent has rights under Section 60, they are subsumed under those arising from his collective bargaining agreement. Since Respondent nowhere denies that this is so, his insistence (Br. Opp., p. 14) that "[t]here is no overlap or entanglement caused here between the role of the Courts and that of the labor agreements process" rings hollow indeed.

Equally devoid of substance are the labels Respondent resorts to in seeking to shrug off this Court's decisions in *Andrews,* 406 U.S. 320, and *Farmer* v. *United Brotherhood of Carpenters & Joiners,* 430 U.S. 290. He asserts that those cases did not involve a person "seeking protection of a statutory right under FELA Section 60," but involved respectively a claim under "the general law of contracts" and an allegation of "tort injury under State law." (Br. Opp., p. 14.) Labels aside, the substance of Respondent's claim is, like the one in *Andrews,* wrongful dicharge. (Pet., p. 7.)

Respondent's distinction is imaginary in a second respect. It is between, on the one hand, something that exists

—the administrative remedies mandated by the Railway Labor Act—and, on the other, a fantasy—civil "remedies granted by statute." (Br. Opp., p. 8.) There are no such civil "remedies" granted by Section 60, a criminal statute. (Pet., p. 10)[1] And, as this Court recently has noted, it has only rarely implied a private right of action to enjoin violations of a criminal statute and has done so only where there was a statutory basis. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 316. Here the legislative history of Section 60 establishes that Congress intended that Respondent's remedy lie before the Adjustment Board, not the courts. (Pet., pp. 10-11.) Respondent cannot and does not dispute that this was Congress's intent.[2]

The availability to Respondent of an administrative remedy before the Board renders meaningless his protestations that Section 60 will be ineffective (Br. Opp., p. 9), "pointless" (*id.*, p. 10), or "worthless" (*id.*, p. 15). The simple fact is that a duplicative remedy is not necessary here to effectuate the congressional purpose behind Section 60. *Chrysler Corp.* v. *Brown*, 441 U.S. at 317.[3] Of overarching significance—again something that Respondent does not deny—such a duplicative remedy would allow circumvention of the Board, as occurred in this case, and hence

---

[1] Nor does 45 U.S.C. § 56 (Br. Opp., p. 9) confer on courts jurisdiction to prohibit violations of Section 60, as a simple examination of Section 56 shows.

[2] Respondent strains credulity in attempting to avoid the lack of civil remedy under Section 60 by stating (Br. Opp., p. 8) that he "seeks not a civil remedy, but protection by a redress that Congress delegated to the court." What is an injunction if not a "civil remedy"? It may indeed be a form of "redress," but as shown above, the injunction Respondent sought under Section 60 is *not* a form of redress that Congress delegated to any court.

[3] Thus, since neither the purpose of Section 60 nor any rights Respondent might have under that provision will be disregarded, his reliance (Br. Opp., pp. 8-9) on *Texas & New Orleans R.R.* v. *Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548, and *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 87, is misplaced.

defeat the exclusive forum requirement that is central to effective operation of the Railway Labor Act's disputes resolution scheme. (Pet., p. 14.)[4]

2. Under Respondent's "scheme of things" he must "languish" before an incompetent and powerless Adjustment Board. (Br. Opp., p. 10.) In actuality, the Railway Labor Act requires him to exhaust his administrative remedy before resorting to the courts. (Pet., p. 10, n.11.) In actuality, the decisions of this Court make clear that the Adjustment Board is completely competent to interpret a collective bargaining agreement in light of a statute or, as Respondent puts it, to decide "legal issues" (Br. Opp., p. 14). *Union Pacific Railroad* v. *Sheehan*, 439 U.S. 89, 92-93 (*per curiam*); *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342. (Pet., p. 9.) And, in actuality, Section 153 First (m) of the Railway Labor Act, which makes Board decisions "final and binding upon both parties to the dispute" (Pet. App. A, p. 1a), has long provided the Board with the necessary power to do what needs to be done.

3. Respondent's "scheme of things" overlooks the continuing efforts to avoid Railway Labor Act arbitration by artful pleading in federal and state courts. (Pet., p. 15.) It also ignores the fact that the decision below permits

---

[4] Of course, a duplicative civil remedy also would allow circumvention of the Act's judicial review procedures, 45 U.S.C. § 153 First (p) and (q), just as occurred in the court below. (*See* Pet., p. 9, n.10.) Respondent suggests (Br. Opp., p. 6) that it was convenient to have "simultaneous consideration" in the court below of various matters making up the incomplete record on which the court acted. He also suggests (*ibid.*) that the review by the court below of this incomplete record was "thorough" and "exacting." But convenience and thorough review of an incomplete record are no substitute for the complete record and for the opportunity for Petitioner to have presented evidence and made legal arguments which would have resulted from adherence to the Act's judicial review procedures in this case. (*See* Pet., p. 9, n.10.)

such avoidance by sanctioning use of the simple device of artfully pleading some right under state or federal law. (Pet., pp. 14-15.)[5] Respondent's "doubts" that an identical "fact circumstance" will recur (Br. Opp., pp. 13-14) miss the mark. It is the *question* that can and does recur due to these continuing efforts to avoid arbitration. Further, "doubts" are no answer to the facts pointed out in the Petition exemplifying these efforts, notably, the two Ninth Circuit decisions with which the decision below is irreconcilable—*Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978), and *Railway Labor Executives Association* v. *Atchison, Topeka & Santa Fe Railway*, 430 F.2d 994 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971) (*see* Pet., pp. 11-13.) Respondent cannot and does not dispute this conflict. Hence he ignores it entirely.

II. There Was a Clash Between the Results Reached by the Court Below and the Adjustment Board.

Respondent would erase the clash between the conflicting results reached by the Board and by the court below with respect to the merits of Respondent's grievance by mistakenly asserting (Br. Opp., p. 6) that the Board found Petitioner's discipline of Respondent "wrongful in prin-

---

[5] Respondent does not even argue that the decision below will not have this effect. In token recognition of the problem, in his statement of facts he merely suggests (Br. Opp., p. 7), erroneously, that the effect of the decision below is limited by the statement of the court below that there may be instances in which a carrier may discipline an employee in connection with matters relating to an FELA case without violating Section 60. As we have shown (Pet., p. 14, n.18), this statement has no effect on the decision below as precedent for avoiding arbitration. The holding below was that a court has jurisdiction in a civil proceeding brought by an aggrieved employee to determine whether Section 60 is violated. (App. B, p. 15a.) Obviously, in exercising such jurisdiction, a court necessarily must decide the merits of whether Section 60—or whatever state or federal right is pleaded—has been violated.

ciple." In fact, the Board found that Respondent had "been disloyal to the Carrier" and that his "offense warrants disciplinary action." (Pet. App. F, p. 30a.) The court below found that Respondent had not been disloyal. (Pet. App. B, pp. 15a-16a.) Had this clash not existed, as Respondent suggests, the court below would not have found it necessary to declare the Board's decision "null and void." (*Id.*, p. 16a.)

III. This Is Not a Dispute Based on the Rights and Duties of a Union Representative.

Respondent mistakenly attempts to refashion his grievance into one based on the rights and duties of a union representative. (Br. Opp., p. 9.) It is no such thing. Respondent's grievance is now and always has been a dispute solely over his rights and duties as an *employee*.[6] Respondent's rights and duties as a union representative, whatever they may be, were not the basis for the relief he sought below[7] or before the Adjustment Board.[8] Nor did the court below rely on any such rights or duties. (Pet. App. B.) Most significantly, Section 60, on which Respondent does rely, protects "employees," not union representatives. (Pet. App. A, p. 3a.) The applicable collective agreement likewise protects him as an employee.

---

[6] Accordingly, whatever responsibilities Respondent may have had as a union representative (Br. Opp., p. 2, n.2) are beside the point and his reliance on *Brotherhood of R.R. Trainmen* v. *Central of Georgia Ry.*, 305 F.2d 605 (5th Cir. 1962), is misplaced. Likewise, his frequent references to his status as a union representative (*e.g.*, Br. Opp., p. 5) have no bearing on this case.

[7] In his complaint (¶ 9), Respondent sought relief, not from interference with his duties as a union representative, but from interference with his "employment."

[8] The Board's award in this case (Pet. App. F, p. 27a), clearly shows that Respondent sought relief as a "Yardman," or "employee," and not as a union representative.

Section 153 First (i) of the Railway Labor Act invests the Adjustment Board with exclusive jurisdiction to resolve grievances between an "employee . . . and a carrier." 45 U.S.C. § 153 First (i) (Pet. App. A, p. 1a). Respondent cannot at this late date read the Railway Labor Act out of this case by refashioning his claim as one based on his rights or duties as a union representative, especially since doing so would remove any arguable basis for his Section 60 claim.

IV. Whether Section 60 Was Violated Is Not the Question Presented.

Respondent also attempts to divert the Court's attention from the Railway Labor Act's disputes resolution machinery by arguing extensively that Section 60 was violated. This is a non-issue. It has no bearing on the question presented in the Petition, namely, whether the Railway Labor Act mandates that the Adjustment Board resolve the dispute between Petitioner and Respondent over whether Respondent may be disciplined consistently with the collective agreement and Section 60. Thus, Respondent's counter-statement of the question presented (Br. Opp., pp. 1-2), which purports to inject as an issue the question of whether Section 60 was violated, is beside the point.[9] Likewise, Part II of Respondent's Brief in Opposition (pp. 10-13), which is devoted entirely to arguing that Petitioner violated Section 60, is devoid of bearing on the question presented in the Petition.[10]

---

[9] In fact, Respondent's counter-question presented is circular. It assumes a violation of Section 60, the very question he purports to present. (Br. Opp., pp. 1-2.)

[10] Accordingly, language respecting a railroad's information disclosure rule in *Parden* v. *Terminal Ry. of the Alabama State Docks Dep't*, 377 U.S. 184, 197 n.14, quoted by Respondent (Br. Opp., p. 12), is inapposite.

We also are constrained to point out that Respondent errs badly in his description of several facts relevant to whether Section 60

CONCLUSION

The Petition for a Writ of Certiorari should be granted and the decision below summarily reversed with instructions to dismiss the complaint. Or, the Court may conclude that the case should be set for briefs and argument.

Respectfully submitted,

CHARLES A. HORSKY
DONNA L. KOHANSKY
888 - 16th Street, N.W.
Washington, D.C. 20006
Tel: (202) 452-6076

Counsel for Petitioner

WILLIAM P. STALLSMITH, JR.
JOHN B. MILLER
EDGAR A. NEELY, JR.
ELLSWORTH HALL, JR.
P.O. Box 1808
Washington, D.C. 20013

Of Counsel

July 1980

---

was violated. (1) Respondent repeatedly asserts (Br. Opp., pp. 1, 3, 4, 5, 10) that he was a "witness" in the FELA case in connection with which he assisted in the surreptitious procurement of evidence that led to Petitioner's disloyalty charge against him. However, Respondent was never called as a witness in that action. (Pet., p. 4, n.2.) (2) Accordingly, it was not his "conduct as a witness" (Br. Opp., p. 7) that in fact was or could have been the subject of either Petitioner's investigation and disciplinary action against him or the Board's arbitration of this dispute. (*See* Pet., pp. 2-3; Pet. App. F, pp. 28a-29a.) (3) Respondent was not discharged for his role in assisting "the preparation of [an] FELA claim" (Br. Opp., p. 5); he was discharged for assisting in an unauthorized entry onto private property surreptitiously to procure photographs used as evidence in the FELA action. (Pet., pp. 2-4; Pet. App. F, pp. 29a-30a.) (4) Respondent was not discharged summarily one day after the conclusion of the FELA action, as he mistakenly asserts (Br. Opp., p. 2); rather, he was on that day temporarily suspended pending Petitioner's internal investigation. (Pet. App. F, p. 28a.)

Supreme Court, U. S.
FILED
DEC 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CENTRAL OF GEORGIA RAILROAD COMPANY, *Petitioner,*

v.

JAMES E. HENDLEY, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

MEMORANDUM OF PETITIONER IN REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES A. HORSKY
DONNA L. KOHANSKY
888 — 16th Street, N.W.
Washington, D.C. 20006
(202) 452-6076

Counsel for Petitioner

WILLIAM P. STALLSMITH, JR.
JOHN B. MILLER
EDGAR A. NEELY, JR.
ELLSWORH HALL, JR.
P.O. Box 1808
Washington, D.C. 20013

Of Counsel

TABLE OF AUTHORITIES

CASES: PAGE

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 .. 1 *et passim*

Andrews v. *Louisville & Nashville Railroad*, 406 U.S. 320 ..... 4 n.

Farmer v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 .....4 n.

Order of Railroad Telegraphers v. *Railway Express Agency, Inc.*, 321 U.S. 342 3

Union Pacific Railroad v. *Sheehan*, 439 U.S. 89 3

STATUTES:

Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e *et seq.* 2, 4

Federal Employers' Liability Act, 45 U.S.C. §60 ..... 1, 3, 4

Railway Labor Act, 45 U.S.C. §153 .....1 *et passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1922

CENTRAL OF GEORGIA RAILROAD COMPANY, *Petitioner,*

v.

JAMES E. HENDLEY, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

MEMORANDUM OF PETITIONER IN REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The Brief of the United States recognizes (p. 13) that disposition of this case requires the Court to reconcile two important federal statutory interests — the mandatory disputes resolution mechanism of the Railway Labor Act, and the employee protection afforded by Section 60 of the Federal Employers' Liability Act. Relying largely on *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, the United States concludes that the court below was correct in deciding that the scheme of the

Railway Labor Act must yield. We submit this brief reply to demonstrate that the decision below cannot be supported on the basis of the *Alexander* decision. Hence, *Alexander* does not detract from the reasons advanced in the petition for granting the writ. Indeed, it further underscores the need for this Court's review.[1]

Alexander was a racial discrimination case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*. There the Court subordinated the general federal policy favoring voluntary arbitration to the statutory anti-discrimination policy in holding that an employee's right to a trial *de novo* under Title VII was not foreclosed by prior submission of his claim to arbitration under a collective bargaining agreement. The Court relied on the intent of Congress that the policy against discrimination was of the "highest priority" (415 U.S. at 47) and on other factors related to the purpose and structure of Title VII.

The balance between the two statutes involved in this case is different. The high priority that Congress has given to protection against racial discrimination has no application to Respondent's Section 60 claim. Likewise, none of the other Title VII factors that prompted the Court's decision in *Alexander* is pertinent here.

First, the Court relied on the investment of plenary power in the federal courts to secure Title VII compliance in actions brought by private individuals to whom Congress had given "a significant role in the enforcement process of Title VII" (*id.*, at 45, 47). Here the reverse is true. By the Railway Labor Act, Congress had mandated an exclusive and comprehensive system by

---

[1] It is not without significance that the court below did not rely upon — or even refer to — *Alexander*.

which minor disputes arising out of the employment relationship are resolved by the Adjustment Board, not the courts. And Section 60 of the FELA does not even expressly authorize a private cause of action, much less give private individuals a significant role in its enforcement.

Second, in *Alexander*, the Court found the arbitral forum inappropriate for determining Title VII rights (*id.*, at 53, 56-57). Here, however, the Adjustment Board is appropriate for determining Section 60 rights asserted by employees subject to the arbitration requirements of the Railway Labor Act. The legislative history of Section 60 shows that Congress was satisfied with the Adjustment Board's past determinations of the very same rights as protected by Section 60 (Pet., pp. 10-11). The Railway Labor Act itself provides the Board with the necessary jurisdiction (Petitioner's Reply, p. 4). And this Court has confirmed that the Board is competent to decide such "legal issues." *Union Pacific Railroad* v. *Sheehan*, 439 U.S. 89; *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342.[2]

Third, the Court's decision in *Alexander* also was premised on the relatively little interference with the federal policy favoring arbitration that would ensue if employees are able to assert non-discrimination rights in two forums, arbitral and judicial (415 U.S. at 50-51,

---

[2] The Brief of the United States offers a superficial and unhelpful analysis in maintaining (p. 9) that "[i]n cases such as this, the controversy requires the interpretation of a federal statute, not the interpretation of a collective bargaining agreement." Indeed, in the very next sentence (pp. 9-10) the United States correctly, but inconsistently, points out that "the Adjustment Board may construe collective bargaining agreements to embody applicable federal law. . .."

54-55). Were this result extended to the present case, however, it would collide head-on with the Railway Labor Act. As this Court has often recognized, the single forum requirement of the Railway Labor Act is central to the purpose and effectiveness of that Act's disputes resolution scheme. (See Pet., pp. 13-14.)

Thus, although, as the United States notes (Br., pp. 5-6), the Court described the Title VII rights asserted in *Alexander* as "independent statutory rights. . . . distinctly separate" from contractual rights (415 U.S. at 49-50), this language has no talismanic value. It does not reconcile the conflict between the Railway Labor Act and FELA Section 60 presented in this case. And it certainly does not mean, as the United States contends (Br., p. 5), that the principles of mandatory and exclusive arbitration under the Railway Labor Act, which this Court has repeatedly stressed, should be abandoned without this Court's review.[3]

Indeed, *Alexander* underscores the need for review of the decision below. There the Court emphasized maintaining the integrity of a statutorily prescribed scheme of remedies. As we have pointed out in the peti-

---

[3] The unhelpfulness of relying on the "independent statutory rights" language of *Alexander* v. *Gardner-Denver Co.* to reconcile the competing federal statutory interests involved here is further revealed by the fact that, in offering this language as a solution, the United States doe not explain how to determine what legal rights asserted by an employee subject to the Railway Labor Act are sufficiently "independent" to justify doing violence to the strong Congressional policy of exclusive arbitration before the Adjustment Board. Clearly, not all rights asserted to be collateral to the collective bargaining agreement warrant bypass of the Railway Labor Act disputes resolution machinery. *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320; *Farmer* v. *United Bhd. of Carpenters & Joiners*, 430 U.S. 290.

tion, the decision below poses a dangerous threat to the integrity of the long-standing and highly successful disputes resolution machinery of the Railway Labor Act. It fully merits review by this Court.

Respectfully submitted,

CHARLES A. HORSKY
DONNA L. KOHANSKY
888 — 16th Street, N.W.
Washington, D.C. 20006
(202) 452-6076

Counsel for Petitioner

WILLIAM P. STALLSMITH, JR.
JOHN B. MILLER
EDGAR A. NEELY, JR.
ELLSWORTH HALL, JR.
P.O. Box 1808
Washington, D.C. 20013

Of Counsel

MOTION FILED
JUN 27 1980

No. 79-1922

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,
v.
JAMES E. HENDLEY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

RICHARD T. CONWAY
RALPH J. MOORE, JR.
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
General Counsel
National Railway Labor Conference
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7200

Attorneys for the National Railway Labor Conference as Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1922

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,

v.

JAMES E. HENDLEY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION OF THE NATIONAL RAILWAY LABOR CONFERENCE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Railway Labor Conference hereby moves the Court, pursuant to its Rule 42, for leave to file the attached *amicus* brief in support of the Petition for Writ of Certiorari.

The Conference is an unincorporated association which includes almost all of the Nation's Class I railroads among its members. One such member is the petitioner Central of Georgia Railroad Company. The Conference represents its members in industrywide collective bargaining with unions representing railroad employees and with regard to a wide variety of other labor relations problems of concern to the railroad industry generally. One such concern is the proper functioning of the procedures for adjusting claims and grievances under Section 3 of the Railway Labor Act, 45 U.S.C. 153.

The decision by the Fifth Circuit that is the subject of the Petition is of major concern to the Conference and to the railroads generally. As is more fully set forth in the attached *amicus* brief, the Fifth Circuit in that decision has completely disregarded the procedures and standards specified in Section 3 of the Railway Labor Act in setting aside an award by an adjustment board established under Section 3. If permitted to stand as a precedent, that decision could be seized upon to justify disregard of the statute in other circumstances affecting other railroads. We believe that the attached *amicus* brief will assist the Court in appreciating the magnitude of the error by the court below and the general national importance of its decision and will otherwise supplement the arguments contained in the Petition.

For these reasons, we request the Court to enter an order granting this motion so as to permit the filing of the attached *amicus* brief.

Respectfully submitted,

RICHARD T. CONWAY
RALPH J. MOORE, JR.
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
General Counsel
National Railway Labor Conference
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7200

Attorneys for the National Railway Labor Conference as Amicus Curiae

INDEX

	Page
Interest of Amicus Curiae	1
Statement of the Case	2
Argument	4
Conclusion	8

CITATIONS

Cases:

Andrews v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972) 3, 4, 5
Devita v. *Burlington Northern, Inc.*, 494 F.2d 347 (9th Cir. 1974), *cert. den.*, 419 U.S. 869 (1974) .. 6
Farmer v. *Carpenters*, 430 U.S. 290 (1977) 8
Kotakis v. *Elgin, Joliet & Eastern Railway Co.*, 520 F.2d 570 (7th Cir. 1975), *cert. den.*, 423 U.S. 1016 (1975) 6
Labor Board v. *Electrical Workers*, 346 U.S. 464 (1953) 8
Locomotive Engrs. v. *L. & N. R. Co.*, 373 U.S. 33 (1963) 5
Moore v. *Illinois Central R. Co.*, 312 U.S. 630 (1941) 5
Union Pacific R. Co. v. *Price*, 360 U.S. 601 (1959) .. 5
Union Pacific R. Co. v. *Sheehan*, 439 U.S. 89 (1978) 6, 7
United Transp. Union v. *Indiana H. B. R. Co.*, 540 F.2d 861 (7th Cir. 1976) 3

Statutes:

Railway Labor Act

§ 3, 45 U.S.C. 153 ..... *passim*
§ 3 First (i), 45 U.S.C. 153 First (i) 2, 4
§ 3 First (m), 45 U.S.C. 153 First (m) 4
§ 3 First (p) and (q), 45 U.S.C. 153 First (p) and (q) 3, 4, 5, 6
§ 3 Second, 45 U.S.C. 153 Second 2

45 U.S.C. § 60 ..... 2, 6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1922

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,

v.

JAMES E. HENDLEY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

This *amicus* brief is being filed with the leave of the Court pursuant to its Rule 42.

INTEREST OF AMICUS CURIAE

As is more fully set forth in the motion for leave to file, the National Railway Labor Conference and its member railroads are vitally concerned with the decision below because of the precedent which it will establish, unless reviewed and reversed by this Court, for setting aside an award by an adjustment board established under Section 3 of the Railway Labor Act (45 U.S.C. 153) without compliance with the procedures and standards specified by the Congress therein for reviewing such arbitration awards. The finality of adjustment board awards, subject only to narrowly limited judicial review as provided in Section 3, is an integral part of the statutory

claims and grievance procedure established by the Congress for railroads and their employees, and is essential to the proper functioning of that procedure. By undermining the finality which the Congress thus provided, the decision below is of major concern to the Conference and its member railroads as well as being erroneous.

STATEMENT OF THE CASE

The pertinent facts and procedural history of this case are fully set forth in the Petition at 2-6. For purposes of this *amicus* brief, we emphasize the following matters which for the most part are set forth in the opinion of the Fifth Circuit, reported at 609 F.2d 1146 and printed in the Petition as Appendix B.

Hendley sued to enjoin the Central of Georgia from investigating charges that he had been disloyal to the railroad in violation of its rules, alleging that such an investigation would violate 45 U.S.C. 60. The District Court held that he was not entitled to relief and dismissed the complaint. 442 F. Supp. 482, Pet. App. D. In its view, Hendley was attempting "to by-pass the mandatory remedies prescribed by the Congress" in Section 3 of the Railway Labor Act (45 U.S.C. 153) which clearly afforded "an adequate administrative remedy under the law." Pet. App. 23a. An injunction pending appeal was denied by both the District Court and the Court of Appeals. See Pet. App. 8a.

Thus, while that appeal was pending, the Central of Georgia proceeded with its investigation and dismissed Hendley for disloyalty. Hendley appealed his dismissal to Public Law Board No. 2086, established pursuant to Section 3 Second of the Railway Labor Act (45 U.S.C. 153 Second), as he was authorized to do by Section 3 First (i), 45 U.S.C. 153 First (i).[1] That arbitration

---

[1] The statute provides for the establishment of such special adjustment or public law boards to arbitrate claims and

board issued an award upholding the railroad's finding that Hendley had been disloyal, but reducing the penalty from dismissal to reinstatement without back pay (Pet. App. F). Hendley did not petition a Federal district court to review that award as provided in 45 U.S.C. 153 First (q), and thus the adjustment board did not "file in the court the record of the proceedings on which it based its action" as is required in the event such a petition for review is instituted.[2]

Rather, Hendley was allowed (over the railroad's objection) by the Court of Appeals to lodge with that court, in connection with the then-pending appeal in this case, a copy of the transcript of the railroad's investigatory hearing and the railroad lodged with that court a copy of the arbitration award. The full record of the proceeding before the arbitration board was not lodged with or filed in that court, and the pending appeal was not taken from the arbitration award or from a district court decision which had reviewed that award. Nonetheless, the Court of Appeals held the arbitration award to be "null and void" and remanded the case to the District Court with directions "to order that the award . . . be set aside, and that Hendley receive full back pay for the time that he was suspended or unemployed as a result of the railroad's actions." Pet. App. 16a. In so doing, the court relied upon its own "review of the testimony before the [railroad's] investigating board" rather than upon the facts found by the arbitration board. Pet. App. 15a.

---

grievances in lieu of the National Railroad Adjustment Board established by Section 3 First. See, *e.g.*, *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320, 325 (1972).

[2] Those provisions are applicable to judicial review of awards by adjustment boards established under Section 3 Second as well as to awards of the National Railroad Adjustment Board under Section 3 First. *E.g.*, *United Transp. Union* v. *Indiana H.B.R. Co.*, 540 F.2d 861 (7th Cir. 1976).

ARGUMENT

In the decision sought to be reviewed, the Court of Appeals has disregarded the procedures and standards specified by the Congress for reviewing and setting aside an award by an adjustment board established under Section 3 of the Railway Labor Act. Unless reversed by this Court, that decision will partially reopen and in some aspects widen a judicial exception to the statutory requirements which this Court, only eight years ago, emphatically overruled in *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972).

Section 3 First (i) of the Act provides that "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes," and that, if the parties to the dispute "fail to reach an adjustment in this manner, the disputes may be referred . . . by either party" to an adjustment board. 45 U.S.C. 153 First (i). The adjustment board is required to issue a written award which "shall be final and binding upon both parties to the dispute." 45 U.S.C. 153 First (m). The only statutory exception is that, in a petition to enforce an award under 45 U.S.C. 153 First (p) or to review an award under 45 U.S.C. 153 First (q), an arbitration award may be "set aside" if the adjustment board failed "to comply with the requirements of this Act, for failure of the [award] to conform, or to confine itself, to matters within the scope of the [board's] jurisdiction, or for fraud or corruption by a member of the" adjustment board. With that exception, "the findings and order of the [board] shall be conclusive on the parties . . . ." 45 U.S.C. 153 First (q).

Such a petition to enforce or review an arbitration award must be "file[d] in the District Court of the United States for the district in which [the petitioner] resides or in which is located the principal operating office of the carrier, or through which the carrier operates," 45 U.S.C. 153 First (p), and when so filed the "Adjustment Board shall file in the court the record of the proceedings on which it based its action." 45 U.S.C. 153 First (q).

This Court has repeatedly "made it clear that this statutory grievance procedure is a mandatory, exclusive, and comprehensive system for resolving grievance disputes" in the railroad industry. *Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33, 38 (1963). "A corollary of this view has been the principle that the process of decision through the Adjustment Board cannot be challenged collaterally by methods of review not provided in the statute." *Ibid.*

At one time, a judicial exception, first recognized in *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630 (1941), permitted a discharged employee who accepted his discharge as final (rather than seeking reinstatement) to bring an action under state law to recover damages for wrongful discharge. Even when that exception was in force, a discharged employee who submitted his grievance to an adjustment board was bound by the board's decision, subject to judicial review specifically provided by the Act, and could not in that circumstance obtain an independent judicial determination as to the validity of his discharge. *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 616 (1959). And, in *Andrews* that Court expressly overruled *Moore* and its progeny, and made emphatically clear that:

> "A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. . . . He is limited to the judicial review of the Board's

> proceedings that the Act itself provides. . . . In such a case the proceedings afforded by 45 U.S.C. § 153 First (i), will be the only remedy available to the aggrieved party." 406 U.S. at 325.

Hence, the court below plainly erred in permitting Hendley to relitigate issues decided by the adjustment board "in an independent judicial proceeding" entirely apart from "the judicial review of the Board's proceedings that the Act itself provides." Moreover, in thus acting to set aside the arbitration award outside of the statutory review procedure, the Court of Appeals did not even give lip service to the statutory limitations upon the scope of that judicial review which this Court noted as being "among the narrowest known to the law," in *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 91 (1978). This Court went on in *Sheehan* to hold that the provision in 45 U.S.C. 153(q), under which an award "may be set aside only for the three reasons specified therein . . . , means just what it says." *Id.* at 93. And, the Court of Appeals made its own independent determination of the facts—on the basis of a partial record—even though the statutory command that the "findings" of an arbitration board "shall be conclusive on the parties" has generally been recognized as virtually precluding review of a board's factual determinations. See, *e.g.*, *Kotakis* v. *Elgin, Joliet & Eastern Railway Co.*, 520 F.2d 570, 575 (7th Cir. 1975), cert. den., 423 U.S. 1016 (1975); *Devita* v. *Burlington Northern, Inc.*, 494 F.2d 347, 349 (9th Cir. 1974), cert. den., 419 U.S. 869 (1974).

The Court of Appeals attempted to justify its disregard of the Railway Labor Act as construed by this Court on the ground that "45 U.S.C. § 60 . . . override[s] the statutory arbitration processes." Pet. App. 9a. But, nothing in that statute or in the Railway Labor Act so provides, and this Court has not recognized such an exception in its decisions. Even if the court below were correct in concluding that a district court has ju-

risdiction to enjoin a railroad from conducting a disciplinary proceeding "which is violative of § 60," Pet. App 15a, that did not occur here. The discipline investigation was not enjoined and therefore went forward, and Hendley voluntarily invoked arbitration by an adjustment board. The Court of Appeals did not explain or cite any authority for the proposition that the assumed jurisdiction to enjoin an investigation in the first place somehow conferred jurisdiction to set aside the arbitration award in a proceeding which was not brought for that purpose and did not otherwise comply with the procedures and standards required by the Railway Labor Act for review of adjustment board awards. In making that quantum jump, the court plainly contravened the language of the Railway Labor Act and the decisions of this Court construing that statutory language.

The general importance of the issues involved to the proper functioning of the Railway Labor Act is indicated by the statement of this Court in *Union Pacific R. Co.* v. *Sheehan*, *supra* at 94, that:

> "The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determination. Normally finality will work to the benefit of the worker: He will receive a final administrative answer to his dispute; and if he wins, he will be spared the expense and effort of time-consuming appeals which he may be less able to bear than the railroad. . . . Here, the principle of finality happens to cut the other way. But even-handed application of this principle is surely what the Act requires."

The importance of those issues, and thus of review by this Court, is emphasized by the fact that, as this Court also has observed, "[t]here is no more elemental cause for discharge of an employee than disloyalty to his

employer." *Labor Board* v. *Electrical Workers*, 346 U.S. 464, 472 (1953). Hence, the dispute between Hendley and the Central of Georgia that gave rise to the arbitration award did not concern some matter of "merely peripheral concern" under the Railway Labor Act, but rather conduct that plainly is within the "central aim" of the statutory grievance procedure. See *Farmer* v. *Carpenters*, 430 U.S. 290, 296 (1977). It is as important in such circumstances to protect the regulatory scheme established by the Railway Labor Act as it is to protect the regulatory scheme under the Labor Management Relations Act involved in *Farmer*.

CONCLUSION

For these reasons and those stated in the Petition, the Petition for Writ of Certiorari should be granted. For those same reasons, we also suggest that a summary reversal is appropriate.

Respectfully submitted,

RICHARD T. CONWAY
RALPH J. MOORE, JR.
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
General Counsel
National Railway Labor Conference
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7200

Attorneys for the National Railway Labor Conference as Amicus Curiae

Supreme Court, U. S.
FILED
DEC 10 1980
MICHAEL RODAK, JR., CLERK

No. 79-1922

In the Supreme Court of the United States

OCTOBER TERM, 1980

CENTRAL OF GEORGIA RAILROAD COMPANY,
PETITIONER

v.

JAMES E. HENDLEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

WILLIAM KANTER
JOHN C. HOYLE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1922

CENTRAL OF GEORGIA RAILROAD COMPANY,
PETITIONER

v.

JAMES E. HENDLEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether a federal district court has jurisdiction to entertain a civil suit filed by a railroad employee seeking injunctive relief from a discharge allegedly imposed in violation of 45 U.S.C. 60, which prohibits an employer from disciplining or attempting to discipline an employee for voluntarily furnishing information regarding another employee's injury or death.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	4
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 ..... 5, 6, 9, 10, 11, 13
Andrews v. *Louisville & Nashville R.R.*, 406 U.S. 320 ..... 5, 9, 12
Brotherhood of Railroad Trainmen v. *Chicago River & Indiana R.R.*, 353 U.S. 30 ..... 4–5, 9
Cannon v. *University of Chicago*, 441 U.S. 677 8
Conley v. *Gibson*, 355 U.S. 41 ..... 6, 9
Cort v. *Ash*, 422 U.S. 66 8
Farmer v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 ..... 11, 12
Franklin v. *Southern Pacific Transportation Co.*, 593 F.2d 899 10–11
Glover v. *St. Louis-San Francisco Ry.*, 393 U.S. 324 6
Gunther v. *San Diego & A. E. Ry.*, 382 U.S. 257 5
Hines v. *Anchor Motor Freight*, 424 U.S. 554 11
Kozar v. *Chesapeake & Ohio Ry.*, 320 F. Supp. 335, rev'd in part, 449 F.2d 1238 .. 6
Magnuson v. *Burlington Northern, Inc.*, 576 F.2d 1367, cert. denied, 439 U.S. 930 12

PREVIOUS PAGE WAS BLANK

Cases—Continued: Page

Railway Labor Executives Association v. *Atchison, Topeka & Santa Fe Ry.*, 430 F.2d 994, cert. denied, 400 U.S. 1021 12–13

Touche Ross & Co. v. *Redington*, 442 U.S. 560 7–8

Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 8

Union Pacific R.R. v. *Price*, 360 U.S. 601 ..... 4, 5, 9

Union Pacific R.R. v. *Sheehan*, 439 U.S. 89 ..... 5, 10

Statutes:

Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* 1

45 U.S.C. 60 ..... *passim*

Miscellaneous:

Amending the Federal Employers' Liability Act: Hearings on S. 1708 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 1st Sess. (1939) .. 6

H.R. Conf. Rep. No. 1463, 76th Cong., 1st Sess. (1939) 7

S. Rep. No. 661, 76th Cong., 1st Sess. (1939) 6–7

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

This action was brought by respondent James E. Hendley to enjoin his employer, petitioner Central of Georgia Railroad Company, from conducting a disciplinary investigation and from discharging him after he rendered assistance to a fellow employee in connection with a suit against the railroad under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* ("FELA").[1]

Respondent Hendley has been employed by Central of Georgia for 25 years as a switch engine foreman and serves as local chairman of the United Transportation Union (Pet. App. 4a-5a). A fellow employee, Daniel Razook, was injured in 1977 while working on a segment of Central of Georgia's railroad track that runs through the property of Union Camp Corporation (*id.* at 5a). Hendley was not present at the scene of the accident, but Razook nonetheless asked him to help determine the exact physical layout of the tracks where the accident occurred (*ibid.*). Hendley agreed and thereafter conducted Razook and his attorney to the place where the tracks were located (*ibid.*). While they were there, the attorney took photographs of the yard for use in Razook's FELA case (*ibid.*).

Hendley's deposition was taken in connection with Razook's FELA case, but he was not called as a witness (Pet. App. 6a). On December 1, 1977, the day after the FELA action ended, Hendley received a letter charging him with "disloyalty to the Central of Georgia Railroad Company in that [he] accompanied

[1] This Statement is based on the facts set forth in the opinion of the court of appeals (Pet. App. 4a-16a).

and assisted Mr. Billy Moore [Razook's attorney] onto the property of the Union Camp Corporation on an unknown date for the purpose of making photographs of Union Camp Corporation's property for use in a law suit against the Central of Georgia Railroad Company and Union Camp which is in violation of Rule R of the book of operating rules of Southern Railway System" (Pet. App. 6a–7a).[2] The letter also informed Hendley that a formal investigation regarding his conduct would be held on the following day (Br. in Opp. App. B). In addition, Hendley was suspended from service pending the outcome of the investigation (Pet. App. 7a). Hendley then obtained a postponement of the scheduled hearing (*ibid.*).

On December 8, 1977, Hendley filed the present suit in the United States District Court for the Southern District of Georgia seeking to enjoin Central of Georgia from violating 45 U.S.C. 60 by conducting the disciplinary hearing or interfering with his continued employment (Pet. App. 7a).[3] The district court denied

---

[2] Rule R of the Southern Railway System's operating rules (Pet. App. 7a n.2) provides:

> Employees must not divulge to any person other than the shipper, consignee or a duly authorized public officer, any information concerning shipments of freight, which information might be used to the disadvantage of the patrons of the railroad.
>
> Information detrimental to the Company's interests must not be divulged except to proper officers or to others authorized to obtain such information.

[3] 45 U.S.C. 60 provides in pertinent part: "Any * * * rule * * * or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever * * * shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or at-

Hendley's request for an injunction, holding that the employer's disciplinary action gave rise to a "minor dispute" within the exclusive jurisdiction of the National Railroad Adjustment Board (Pet. App. 18a-25a).[4] The court stated (Pet. App. 23a) that it had "little doubt that violations of [45 U.S.C. 60] may be enjoined in connection with an on-going FELA case," but ruled that once an FELA suit is concluded the mandatory arbitration remedies provided by the Railway Labor Act ("RLA") are exclusive. Hendley's motion for an injunction pending appeal was denied (Pet. App. 8a).

The disciplinary hearing was conducted on February 15, 1978, and Hendley was dismissed from service (Pet. App. 8a). Hendley then processed his grievance through the arbitration procedures provided under the Railway Labor Act (*ibid.*). The National Railroad Adjustment Board sustained the determination that Hendley had been disloyal, but held that his dismissal was too harsh a penalty (*ibid.*). Accordingly, the Board ordered that Hendley be reinstated with full seniority, but without back pay (*ibid.*).

Following the Board's determination, the court of appeals rendered its decision on Hendley's appeal from the adverse decision of the district court. It held (Pet. App. 15a) that "even after the conclusion of an FELA case * * * a federal district court has jurisdiction to determine whether a disciplinary hearing is brought

---

tempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both * * *."

[4]The district court defined a "minor dispute" as one that "generally concerns the meaning or proper interpretation and application of rules or working conditions under the collective bargaining agreement" (Pet. App. 21a). See also note 5, *infra*.

for purposes violative of §60, or whether the railroad is attempting to discipline the employee for a violation of lawful company rules." The court also concluded (*ibid.*) that "[i]t is clear from a review of the testimony before the investigating board that the actions of Hendley which were the subject of the investigation are within the protection of §60." The court added (*id.* at 16a) that "[s]ince Hendley's actions could not lawfully be the subject of disciplinary action and arbitration, any award made by the National Railroad Adjustment Board is null and void." Accordingly, the court reversed and remanded the case to the district court with instructions to set aside the Board's order and award back pay to Hendley for the time he was suspended as a result of the railroad's actions (*ibid.*).

DISCUSSION

The court of appeals correctly held that the Federal Employers' Liability Act provides an exception to the general requirement of the Railway Labor Act that employee discharge controversies be decided through arbitration. In a comprehensive opinion, the court of appeals concluded that federal courts have jurisdiction to enjoin violations of 45 U.S.C. 60, and that exercise of that jurisdiction does not improperly interfere with the arbitration process. Because the court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals, review by this Court is unwarranted.

1. To facilitate the peaceful settlement of labor disputes and insure the continuity of interstate transportation, Congress established a mandatory arbitration procedure to handle minor contractual disputes that cannot be resolved by the parties through negotiations. *Union Pacific R.R.* v. *Price*, 360 U.S. 601, 609 (1959); *Brotherhood of Railroad Trainmen* v. *Chicago*

River & Indiana R.R., 353 U.S. 30, 34 (1957).[5] Ordinarily, the arbitration process is the exclusive method for resolving such disputes, and litigation in the courts is foreclosed except for judicial review of the Adjustment Board's decision. *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320 (1972); *Gunther* v. *San Diego & A. E. Ry.*, 382 U.S. 257, 263 (1965).[6]

This Court has emphasized that the arbitration process was "designed for effective and final decision of grievances which arise daily, principally as matters of the administration and application of the provisions of collective bargaining agreements." *Union Pacific R.R.* v. *Price*, *supra*, 360 U.S. at 616. In general, the arbitration process is mandatory, not optional, and an employee alleging wrongful discharge must resort to that process. See *Andrews* v. *Louisville & Nashville R.R.*, *supra*.

These principles are not controlling, however, in a case such as this, in which the employee seeks to vindicate in federal court "independent statutory rights accorded by Congress." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 49–50 (1974). Hendley claims in this case that the actions taken against him by his employer violate 45 U.S.C. 60, not the terms of the col-

---

[5] Minor disputes "are controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee." *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R.*, *supra*, 353 U.S. at 33.

[6] A reviewing court may reverse the arbitration board's decision only in limited circumstances:

> (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform, or confine itself to matters within the scope of its jurisdiction; and (3) fraud or corruption.

Union Pacific R.R. v. *Sheehan*, 439 U.S. 89, 93 (1978).

lective bargaining agreement. And the "distinctly separate nature of these contractual and statutory rights is not vitiated merely because both [may have been] violated as a result of the same factual occurrence." 415 U.S. at 50. Accordingly, there is no warrant for requiring Hendley to pursue arbitration as an "exclusive" remedy in these circumstances.[7]

2. In our view, the purposes that Congress sought to achieve when it enacted 45 U.S.C. 60 supply convincing evidence that employees threatened with illegal retaliation were intended to have a remedy in federal court. When it enacted this provision in 1939, Congress was aware that many carriers had rules that could be interpreted to authorize the discharge of employees for disloyalty to the company if they disclosed relevant information to FELA plaintiffs. See, *e.g.*, *Amending the Federal Employers' Liability Act: Hearings on S. 1708 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 1st Sess. 39–46, 82–84 (1939). Recognizing "the danger of direct coercion by railroad agents against its employees" (*Kozar* v. *Chesapeake & Ohio Ry.*, 320 F. Supp. 335, 370 n.17 (W.D. Mich. 1970), rev'd in part on other grounds, 449 F.2d 1238 (6th Cir. 1971)), Congress enacted Section 60 to "prohibit[ ] the promulgation or enforcement of rules which penalize railroad employees for giving information concerning accidents to the injured person

[7] This Court has recognized, moreover, that arbitration is not always the employee's exclusive remedy even when his claim may fairly be construed as deriving from the collective bargaining agreement. For instance, an employee has a right to bypass the arbitration process and bring suit in district court when his union is guilty of a breach of the duty of fair representation (*Conley* v. *Gibson*, 355 U.S. 41, 44–45, 47 (1957); *Glover* v. *St. Louis-San Francisco Ry.*, 393 U.S. 324 (1969)), or when the carrier has engaged in racial discrimination (*id.* at 328–329).

or his representative" (S. Rep. No. 661, 76th Cong., 1st Sess. 2 (1939)). Section 60 declares any such rule "void" and prescribes criminal penaltics for anyone who "discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest.* * *."[8]

Although the statute does not expressly authorize civil enforcement, we believe that "Congress intended

---

[8]The Senate Committee summarized the background and purpose of Section 60 as follows (S. Rep. No. 661, *supra*, at 5):

> The railroads maintain well-organized and highly efficient claim departments. When an employee is injured, the claim agent promptly endeavors to procure statements from all witnesses to the infliction of the injury, takes photographs, measurements, and obtains all available information considered necessary to protect the railroad company against a possible suit for damages.
>
> On the other hand, the claimant may be seriously handicapped in his attempt to procure the information necessary to the determination of the question of liability. For example, a substantial number of the railroads subject to the Employers' Liability Act have promulgated rules which prohibit employees from giving information concerning an accident to anyone excepting certain specified company officials and claim agents.
>
> The purpose of the amendment under consideration is to prohibit the enforcement of such rules and permit those who have information concerning the facts and circumstances of a personal injury to give statements to the injured employee or his dependents, or to someone authorized to represent him or them.

The Conference Committee explained (H.R. Conf. Rep. No. 1463, 76th Cong., 1st Sess. 4 (1939)) that the provision makes "illegal and void any efforts to prevent railroad company employees from furnishing voluntarily information to a person in interest with reference to the facts incident to the injury or death of any railroad employee." Accordingly, Section 60 prevents railroads from "attempt[ing] to coerce an employee to prevent him from furnishing such information or to discipline or discharge him for doing so." *Ibid.*

to create * * * by implication * * * a private cause of action" such as that asserted here by respondent against the carrier. *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575 (1979).[9] Here, as in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18 (1979), Congress' declaration that offending provisions are "void" is a clear manifestation of legislative intent to vest in the victims of illegal sanctions "a right to specific and limited relief in a federal court." It may be inferred that Congress "intended that the customary legal incidents of voidness would follow, including the availability of a suit for * * * an injunction * * * and for restitution." *Id.* at 19. See also *Cannon* v. *University of Chicago*, 441 U.S. 677, 689–694 (1979).

That conclusion is supported by consideration of the four factors enunciated in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). First, plaintiff is "one of the class for whose *especial* benefit the statute was enacted." Section 60 was intended to protect both the FELA plaintiff and persons having information relevant to his lawsuit, such as respondent here. See note 8, *supra*. Second, although we have found nothing in the legislative history discussing private remedies, the legislative history cited above evinces a clear intent on the part of Congress effectively to protect employees from discharge or discipline for providing relevant information to FELA plaintiffs. Thus, Congress would appear to have intended to authorize a suit for equitable relief

[9] In the courts below, it appears that all parties were in agreement that Section 60 implicitly authorizes a civil action under some circumstances. The court of appeals stated (Pet. App. 8a): "The parties agree, and the district court held, that an injunction may issue to prevent violations of §60 in an ongoing FELA case." Petitioner now appears to question the view that Section 60 affords a civil remedy. See petitioners' Reply Br. 3. Accordingly, we state briefly in the text our reasons for concluding that Congress intended to authorize a civil suit for equitable relief under Section 60.

when such a suit is necessary to carry out that purpose. Third, such an action is consistent with the legislative scheme embodied in the FELA because it facilitates the presentation of relevant evidence in suits brought under that statute.[10] Finally, it is not inappropriate to infer a cause of action based solely on federal law because insuring the full development of relevant evidence in suits brought under the FELA is a matter of paramount concern to the federal government.

3. The statutory purpose underlying Section 60 could not be achieved if civil actions brought under that Section were subordinated to the arbitration process. As previously noted, Congress intended arbitration to be the exclusive method of resolving disputes arising under existing collective bargaining agreements. See *Andrews* v. *Louisville & Nashville R.R.*, *supra*, 406 U.S. at 324-326; *Union Pacific R.R.* v. *Price*, *supra*, 360 U.S. at 616; *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R.*, *supra*, 353 U.S. at 33. As this Court ruled in *Andrews*, an employee may not avoid the arbitration process merely by bringing a suit in state court for wrongful discharge in violation of an employment contract. But the situation is far different when, as here, an employee is alleged to have been discharged in violation of an independent federal statute enacted for the very purpose of preventing such a sanction. In cases such as this, the controversy requires the interpretation of a federal statute, not the interpretation of a collective bargaining agreement. See *Alexander* v. *Gardner-Denver Co.*, *supra*; *Conley* v. *Gibson*, *supra*, 355 U.S. at 45.

Although the Adjustment Board may construe collective bargaining agreements to embody applicable

[10] We demonstrate below that such a remedy does not frustrate the legislative scheme embodied in the RLA.

federal law, there is no indication that Congress intended enforcement of Section 60 to be relegated to the arbitration process.[11] And in our view, that process is not an adequate remedy for persons injured by violations of Section 60. See *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 52–53, 56–58. Not only does the Adjustment Board lack experience in dealing with issues under Section 60, but, as the court of appeals pointed out (Pet. App. 10a), forcing an employee to go through the initial disciplinary process and subsequent arbitration would, by itself, infringe Section 60. Arbitration does not begin until after the employee has been disciplined. As the court of appeals explained (Pet. App. 14a): "If a railroad is allowed to discipline an employee for furnishing information to an FELA plaintiff, and the employee is required to submit to the hearing and to process his claim through arbitration before finally reaching the federal courts, the coercive effect is overwhelming." Moreover, it is not clear that meaningful judicial review would be available following arbitration. The narrow scope of judicial review under the RLA would not appear to permit a court to consider whether the Adjustment Board had properly construed and applied Section 60. *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89, 93 (1978).

4. The completion of the RLA arbitration process in this case should not prevent judicial enforcement of Section 60. See generally *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 52–54; *Franklin* v. *Southern Pacific Transportation Co.*, 593 F.2d 899,

[11] Indeed, the arbitral decision in this case, which petitioner claims is preclusive of Hendley's judicial remedies, does not even mention 45 U.S.C. 60 or Hendley's rights thereunder. The decision merely discusses Hendley's "disloyalty" without any apparent recognition that Congress has guaranteed his right to assist fellow employees in preparing for an FELA case (Pet. App. 28a–30a).

901 (9th Cir. 1979); see also *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 571–572 (1976). Respondent invoked the arbitration process only after the district court erroneously had refused to enjoin the employer's attempt to discharge him in violation of Section 60. Thus, had the district court ruled correctly in the first instance, or had it granted interim relief pending appeal, it would not have been necessary for respondent to pursue arbitration. Respondent should not be faulted for pursuing his arbitration remedy while his appeal from the district court decision was pending. First, he faced the prospect of unemployment until the appellate process was completed. Second, had he foregone the arbitration remedy until his appeal was decided, he would have risked receiving an adverse appellate decision and then being barred from pursuing arbitration due to tardiness.

Moreover, continuation of the judicial process at this stage does not constitute relitigation of the arbitration decision because this suit does not involve judicial review of that decision, but rather is an independent proceeding to enforce the requirements of a federal statute.[12] The issue before the Adjustment Board was the proper application of the collective bargaining agreement, including Rule R of the Southern Railway's operating rules (see note 2, *supra*), not the interpretation of 45 U.S.C. 60. See *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 54.

5. The decision of the court of appeals in this case does not conflict with any decision of this Court or of

[12] Setting aside the Adjustment Board's determination not to award respondent back pay does not constitute undue "interference" with the RLA statutory scheme. *Farmer* v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290, 305 (1977). The court of appeals could not have left the Adjustment Board's decision standing because it directly conflicted with a judicial decision construing mandatory provisions of the FELA.

any other court of appeals. Petitioner's contention (Pet. 6) that *Andrews* v. *Louisville & Nashville R.R.*, *supra*, and *Farmer* v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977), conflict with the court of appeals' decision is incorrect. *Andrews* dealt with an employee's attempt to invoke state court jurisdiction in a suit for wrongful discharge under an employment contract, in derogation of the arbitration procedures specified by the RLA for the resolution of minor contractual disputes. The employee did not allege that his discharge violated a federal statute vesting him with a right to equitable relief.[13] In *Farmer*, the issue was whether the National Labor Relations Act preempts a tort action in state court against a union and its officers to recover damages for intentional infliction of emotional distress. 430 U.S. at 292. This Court held that Congress did not intend to supplant state court jurisdiction when the tort is "unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened * * *." 430 U.S. at 305. Clearly, neither *Andrews* nor *Farmer* raises issues comparable to those in the present suit, which involves equitable enforcement of the FELA's anti-retaliation provision.

The Ninth Circuit decisions relied on by petitioner (Pet. 11–12) are also inapposite. *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), cert. denied, 439 U.S. 930 (1978), involved a discharge controversy arising from an employee's alleged negligence on the job. Under familiar principles, this controversy was relegated to the RLA arbitration process. *Rail-*

[13] The Court expressly noted in *Andrews* that "[h]ere it is conceded by all that the only source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective-bargaining agreement between the employer and the union." 406 U.S. at 324.

way Labor Executives Association v. *Atchison, Topeka & Santa Fe Ry.*, 430 F.2d 994 (9th. Cir. 1970), cert. denied, 400 U.S. 1021 (1971), involved damage claims resulting from discontinuance of certain train services. The court of appeals found that resolution of the controversy required an analysis of the "past bargaining history, current industry practices, and the effect of [acceptance of the plaintiff's contentions] upon future bargaining in the industry as a whole." 430 F.2d at 997. The court concluded that these issues related to "the law of the shop, not the law of the land" (*Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 57), and hence were entrusted by Congress to the arbitration process under the RLA, not the federal courts. Neither of these cases considers the propriety of equitable relief in federal court for violations of 45 U.S.C. 60.

In sum, while this case presents a novel question requiring reconciliation of two federal statutes, we think the decision of the court of appeals strikes the balance intended by Congress. Since that decision does not conflict with any decision of this Court or any other court of appeals, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

WILLIAM KANTER
JOHN C. HOYLE
Attorneys

DECEMBER 1980

☆ U.S. GOVERNMENT PRINTING OFFICE: 1980 334160 186